RESEARCH AND DEVELOPMENT JOINT VENTURES

HEARING

BEFORE THE

SUBCOMMITTEE ON
SCIENCE, RESEARCH AND TECHNOLOGY

OF THE

COMMITTEE ON
SCIENCE AND TECHNOLOGY
U.S. HOUSE OF REPRESENTATIVES

NINETY-EIGHTH CONGRESS

FIRST SESSION

JULY 12, 1983

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RESEARCH AND DEVELOPMENT JOINT VENTURES

TUESDAY, JULY 12, 1983

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SCIENCE AND TECHNOLOGY,
SUBCOMMITTEE ON SCIENCE, RESEARCH AND TECHNOLOGY,
Washington, D.C.

The subcommittee met, pursuant to call, at 9:30 a.m., in room 2325, Rayburn House Office Building, Hon. Doug Walgren (chairman of the subcommittee) presiding.

Members present: Hon. Norman Y. Mineta, Hon. Buddy MacKay, Hon. Judd Gregg, Hon. James Sensenbrenner, and Hon. Joe Skeen.

Mr. WALGREN. Let me call us to some order and start these hearings on proposals in the area of research and development joint ventures.

This morning the Subcommittee on Science, Research and Technology will hear witnesses on two bills that were referred to this subcommittee: H.R. 1952, the Joint Research and Development Ventures Act of 1983, sponsored by Congressman Synar, Congressman Gephardt, Congressman Wyden, and Congressman Zschau; and H.R. 3393, the High Technology Research and Development Joint Ventures Act of 1983, sponsored by Congressman Sensenbrenner and Congresswoman Lloyd. These bills were referred jointly to the Committees on Judiciary and Science and Technology.

This subcommittee recently held joint hearings with our sister committee, Investigations and Oversight, of the Science and Technology Committee on the subject of Japanese industrial policy and U.S. responses through research joint ventures.

The testimony presented at those hearings detailed how our overseas competition has effectively implemented a well-coordinated policy of favorable government and industry interaction. We have seen the effects of this well-orchestrated policy in terms of a declining domestic and world market share for U.S. industry in some areas, and certainly the dominance of the world market in areas that those particular trading partners have so focused on and coordinated their internal economies.

Recognizing that foreign trade and our ability to compete effectively in the world marketplace is becoming of ever increasing importance for our economic well-being. It is certainly past time for the United States to focus our attention on whatever bars and whatever constructive actions we can take to make our ability to compete in this area more effective.

In the hearings that I mentioned, we heard views expressed that we in the United States are wasting valuable and scarce resources by limiting ourselves to a system where companies work, and must work, totally independently in the same field of interest to make scientific discoveries or technological developments on their own, often duplicating each other's work or not having the critical mass necessary to be able to make the kinds of forward strides that are inherent in this area.

Concern about antitrust law violation was given as the reason for many companies deciding not to share in joint research and development activities.

The bills to be discussed today represent an attempt to eliminate the disincentive in terms of antitrust risk associated with companies joining together to conduct what can only be viewed from our national perspective as constructive, procompetitive research and development activities.

I would like to certainly welcome and say a special good morning to our witnesses and turn to Congressman Sensenbrenner, who has been particularly active in this area and is the author of the second bill that I referred to.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman.

I appreciate the opportunity to address the subcommittee during its consideration of legislation that would modify our antitrust laws with respect to research joint ventures. As my colleagues on the subcommittee are aware, I have, along with our colleague from Tennessee, Mrs. Lloyd, introduced legislation on this subject.

Our legislation, H.R. 3393, the High Technology Research and Development Joint Venture Act of 1983, we believe will best address our need to stimulate private investment in research and development, while at the same time maintaining the essence of our competitive economic system.

Mr. Chairman, I would like to ask that my prepared statement be included in the record so that I might summarize my thoughts on the need for this legislation and the provisions of H.R. 3393, together with the chart that compares H.R. 3393, H.R. 1952, and H.R. 108.

This country's economic ills have been caused by several factors. One key factor pointed out in various economic indicators has been our country's notable decline in industrial productivity. This decline in productivity is representative of this country's eroding technological leadership and lagging international competitiveness.

This situation can be traced to more than a decade of low capital investment and limited R&D spending. Although this country still leads the world in spending for basic research, the 1980 Harvard Business Review Report pointed out that the private sector investment in research and development has been steadily declining in recent years, with no change in the foreseeable future.

As a result, many of our foreign competitors in recent years, aided by their government's antitrust policies, have been able to achieve preeminence in many of our high-technology industries. The trend is one which our Nation cannot afford to tolerate and which must be reversed as soon as possible.

H.R. 3393 represents a significant step in meeting this national challenge, but recognizes that the most effective Federal actions to

stimulate long-term private investments in research and development are those that remove potential structural barriers to such investment.

This legislation attempts to overcome these institutional barriers and to allow a wide range of businesses to carry out productive research on a joint basis.

Basically, H.R. 3393 will provide immunity from Federal and similar State antitrust laws for any venture if it meets certain statutory requirements. These requirements relate to the length of the venture, 15 years, patent rights and administrative and managerial requirements among others.

The venture must also meet an initial capital formation test in order to insure that the R&D market remains competitive and can accommodate at least four ventures of any one type.

While there are numerous technical and procedural differences between H.R. 3393 and H.R. 1952, I would like to call my colleagues' attention to four major policy differences between these two bills.

First and foremost, H.R. 3393 would modify the rule relating to the award of damages in antitrust suits. H.R. 3393 would provide a remedy of actual damages against any venture that was found in noncompliance with this act and also in violation of the antitrust laws, whereas H.R. 1952 does not address this question. This has been recommended strongly during our recent hearings.

The second, H.R. 3393, recognizes that if the parties to the joint venture contract constitute 25 percent or more of the relevant R&D market, they would not be permitted to qualify unless they qualify for one of four stated exemptions. This feature ensures that there will continue to be strong competition in areas where joint ventures have been formed.

This is consistent with the policy recently expressed by the administration. This test is different from the one used in H.R. 1952, which prohibits ventures under a product market test.

Third, the management board in H.R. 3393 is made up of one person from each party to the contract, whereas the management board under H.R. 1952 even includes three nonparticipant members.

Finally, in regard to participation under H.R. 3393, no other person may become a party to the joint venture contract unless payment is made to other members based upon the reasonable cost of research undertaken to that point. Whereas, under H.R. 1952, mandatory sharing provisions are included and any U.S. firm may participate in the venture upon the same terms that the other participants at any time.

Therefore, I would urge my colleagues to consider the provisions of the various legislative proposals very closely and I look forward to working with my colleagues during this process.

I thank the chairman.

[The prepared statement of Mr. Sensenbrenner follows:]

TESTIMONY OF THE HONORABLE
F. JAMES SENSENBRENNER, JR. (R-WIS.)

BEFORE THE SCIENCE, RESEARCH AND TECHNOLOGY SUBCOMMITTEE
HEARING ON H.R. 1952 AND H.R. 3393,
JOINT RESEARCH VENTURES ACTS

JULY 12, 1983

MR. CHAIRMAN:

I THANK YOU FOR THE OPPORTUNITY TO ADDRESS THE SUBCOMMITTEE DURING ITS CONSIDERATION OF LEGISLATION THAT WOULD MODIFY OUR ANTITRUST LAWS WITH RESPECT TO RESEARCH JOINT VENTURES. AS MY COLLEAGUES ON THE SUBCOMMITTEE ARE AWARE, I HAVE, ALONG WITH OUR COLEAGUE FROM TENNESSEE, MRS. LLOYD, INTRODUCED LEGISLATION ON THIS SUBJECT. THIS LEGISLATION, H.R. 3393, THE HIGH TECHNOLOGY RESEARCH AND DEVELOPMENT JOINT VENTURE ACT OF 1983, WE BELIEVE, WILL BEST ADDRESS OUR NEED TO STIMULATE PRIVATE INVESTMENT IN RESEARCH AND DEVELOPMENT, WHILE AT THE SAME TIME MAINTAINING THE ESSENCE OF OUR COMPETITIVE ECONOMIC SYSTEM.

THIS COUNTRY'S ECONOMIC ILLS HAVE BEEN CAUSED BY SEVERAL FACTORS. ONE KEY FACTOR, POINTED OUT IN VARIOUS ECONOMIC INDICATORS, HAS BEEN OUR COUNTRY'S NOTABLE DECLINE IN INDUSTRIAL PRODUCTIVITY. THIS DECLINE IN PRODUCTIVITY IS REPRESENTATIVE OF THIS COUNTRY'S ERODING TECHNOLOGICAL LEADERSHIP AND LAGGING

INTERNATIONAL COMPETITIVENESS. THIS SITUATION CAN BE TRACED TO MORE THAN A DECADE OF LOW CAPITAL INVESTMENT AND LIMITED R&D SPENDING. ALTHOUGH THIS COUNTRY STILL LEADS THE WORLD IN SPENDING FOR BASIC RESEARCH, A 1980 HARVARD BUSINESS REVIEW REPORT POINTED OUT THAT THE PRIVATE SECTOR INVESTMENT IN RESEARCH AND DEVELOPMENT HAS BEEN STEADILY DECLINING IN RECENT YEARS, WITH NO CHANGE IN THE FORESEEABLE FUTURE. AS A RESULT, MANY OF OUR FOREIGN COMPETITORS, IN RECENT YEARS, AIDED BY THEIR GOVERNMENTS' ANTITRUST POLICIES HAVE BEEN ABLE TO ACHIEVE PREEMINENCE IN MANY OF OUR HIGH TECHNOLOGY INDUSTRIES. THIS TREND IS ONE WHICH OUR NATION CANNOT AFFORD TO TOLERATE AND WHICH MUST BE REVERSED AS SOON AS POSSIBLE.

H.R. 3393 REPRESENTS A SIGNIFICANT STEP IN MEETING THIS NATIONAL CHALLENGE. IT RECOGNIZES THAT THE MOST EFFECTIVE FEDERAL ACTIONS TO STIMULATE LONG-TERM PRIVATE INVESTMENTS IN RESEARCH AND DEVELOPMENT ARE THOSE THAT REMOVE POTENTIAL STRUCTURAL BARRIERS TO SUCH INVESTMENT. THIS LEGISLATION ATTEMPTS TO OVERCOME THESE INSTITUTIONAL BARRIERS AND ALLOW A WIDE RANGE OF BUSINESSES TO CARRY OUT PRODUCTIVE RESEARCH ON A JOINT BASIS.

IN ESSENCE, H.R. 3393 WOULD PROVIDE NEW STATUTORY GUIDELINES FOR JOINT RESEARCH AND DEVELOPMENT VENTURES IN ORDER TO DETERMINE WHETHER THESE VENTURES WERE IN COMPLIANCE WITH FEDERAL AND SIMILAR STATE ANTITRUST LAWS. THESE GUIDELINES WOULD ALSO EXTEND TO ANY PARTICIPANT IN THE VENTURE, AS WELL AS ALL EMPLOYEES IN THE VENTURE.

IN ORDER TO QUALIFY UNDER THESE NEW LEGISLATIVE GUIDELINES, THE VENTURE PARTICIPANTS WOULD HAVE TO NOTIFY THE ATTORNEY GENERAL OF THE UNITED STATES THAT THEY PLAN TO ENTER INTO A JOINT RESEARCH AND DEVELOPMENT VENTURE. THE LENGTH OF ANY VENTURE COULD NOT EXCEED 15 YEARS. ANY JOINT VENTURE PARTICIPANT WOULD BE EXEMPT FROM ANY RESTRICTIONS ON OUTSIDE, INDEPENDENT RESEARCH AND DEVELOPMENT ACTIVITIES OR ANY OBLIGATIONS TO PROVIDE THE VENTURE WITH THE RESULTS OF ANY INDEPENDENT WORK. THE ULTIMATE AUTHORITY FOR THE MANAGEMENT OF THE JOINT VENTURE WOULD BE VESTED IN A MANAGEMENT BOARD, TO BE COMPOSED OF ONE REPRESENTATIVE FROM EACH PARTICIPANT IN THE VENTURE.

H.R. 3393 SPECIFICALLY CONTEMPLATES THAT NEW FIRMS COULD JOIN THE VENTURE AT A FUTURE DATE IF THIS WAS AGREED TO BY THE VENTURE PARTICIPANTS, BUT THEY WOULD BE REQUIRED TO PAY A PROPORTIONAL SHARE OF THE COMMON EXPENSES OF THE VENTURE. THIS LEGISLATION CONTEMPLATES, AS A GENERAL RULE, FOUR OR MORE VENTURES IN ANY PARTICULAR AREA. IF THE AGGREGATE SHARES OF THE PARTIES TO THE CONTRACT IN THE RELEVANT MARKET, AS OF THE TIME THE CONTRACT IS MADE, FOR RESEARCH AND DEVELOPMENT PROJECTS IN CONNECTION WITH A PARTICULAR LINE OF COMMERCE EXCEEDED AT ANY TIME 25 PERCENT OF THE RELEVANT MARKET FOR ALL RESEARCH AND DEVELOPMENT PROJECTS IN THE SAME LINE OF COMMERCE, THE CONTRACT WOULD NOT BE COVERED UNDER THIS LEGISLATION UNLESS THE ATTORNEY GENERAL FOUND EITHER (1) THAT THE RESULTS OF THE PROGRAM WERE NOT LIKELY TO BE DIRECTLY APPLICABLE TO THE FUTURE PRODUCTION OF A MARKETABLE PRODUCT, (2) THE PARTICIPATION OF ALL THE PARTIES WAS NECESSARY TO THE SUCCESS

OF THE PROGRAM AND WAS LIKELY TO PRODUCE EFFECTS THAT INCREASED COMPETITION, IMPROVED THE NATIONAL ECONOMY OR FURTHERED NATIONAL SECURITY, OR (3) SUCH CONTRACT WAS MADE FOR THE PURPOSE OF CARRYING OUT RESEARCH AND DEVELOPMENT ESSENTIAL TO DEVELOP A PRODUCT THAT WAS NECESSARY TO ACHIEVE COMPLIANCE WITH ANY FEDERAL LAW RELATING TO THE QUALITY OF THE ENVIRONMENT. THE PARTIES MAY REQUIRE THAT THE ATTORNEY GENERAL DETERMINE WHETHER THEIR CONTRACT MET THIS MARKET TEST. THE ATTORNEY GENERAL'S DETERMINATION IN THIS MATTER WOULD BE CONCLUSIVE.

UNDER H.R. 3393, ALL OF THE PARTIES IN THE JOINT VENTURE WOULD RETAIN TITLE TO ALL INVENTIONS, PATENTS OR OTHER USEFUL INFORMATION DEVELOPED IN THE COURSE OF THE VENTURE. ALL PARTICIPANT FIRMS WOULD ALSO BE ENTITLED TO OBTAIN IRREVOCABLE, NONEXCLUSIVE AND EQUIVALENT LICENSES TO ALL PATENTS OBTAINED BY THE PARTIES. AFTER THREE YEARS, LICENCES WOULD THEN BE MADE AVAILABLE TO ANY OTHER U.S. FIRM ON REASONABLE TERMS.

THIS LEGISLATION WOULD ALSO ALLOW THE ATTORNEY GENERAL TO INVESTIGATE ANY JOINT VENTURE AT ANY TIME IN ORDER TO ENSURE THAT THE REQUIREMENTS OF THE ACT ARE BEING MET. WHENEVER THE ATTORNEY GENERAL COMMENCED AN INVESTIGATION, HE WOULD BE REQUIRED TO NOTIFY THE VENTURE. IF THE ATTORNEY GENERAL DETERMINED THAT THE VENTURE VIOLATED THIS ACT, HE WOULD BE REQUIRED TO SUBMIT A WRITTEN NOTICE TO THE PARTIES IN THE VENTURE, STATING THE FACTS AND REASONS SUPPORTING HIS DETERMINATION AND SPECIFYING THE ACTIONS THAT WOULD BE REQUIRED TO BRING THE VENTURE IN CONFORMANCE WITH THE

REQUIREMENTS OF THIS ACT.

FINALLY, H.R. 3393 PROVIDES THAT NO PARTY SHALL BE LIABLE IN EXCESS OF ACTUAL DAMAGES FOR ANY JOINT RESEARCH AND DEVELOPMENT VENTURE THAT FAILS TO MEET THE REQUIREMENTS OF THIS ACT AND THE FEDERAL ANTITRUST LAWS.

I HAVE ATTACHED TO MY WRITTEN STATEMENT A CHART COMPARING H.R. 3393 WITH THE OTHER LEGISLATIVE INITIATIVES ON THIS SUBJECT. I URGE MY COLLEAGUES TO REVIEW THESE INITIATIVES AND TO LEND THEIR SUPPORT TO THIS LEGISLATION.

ANTITRUST JOINT VENTURE LEGISLATION

PROVISIONS	H.R. 3393	H.R. 1952	H.R. 108
A. Participation	Sec. (3)(a)(6)	Sec. 4(b)	
1. Members	Any person may enter into a contract for R&D Joint Venture Project or Projects.	Any US firm may participate in the venture or any of its R&D programs, upon the same terms as other participants. Sec. 4(b)(1).	Does not address.
2. Non-Members	No other person may become a party to the contract unless payment, based upon a reasonable amount of the cost and value of research is made to all Members. Sec. 3(a)(6).	Entitled to join at any time on the same terms and conditions as other participating firms. Sec. 4(b)(1).	Does not address.
3. Limitation			
a. Sales	If the aggregate share of the parties to the contract exceeds 25%, may not qualify unless they fulfill one of the stated exemptions. Sec. 3(b).	If a firm has sales of 25% or more, and its participation would cause sales to exceed 50%, it may not participate unless Attorney General makes an affirmative finding of a stated exemption. Sec. 4(b)(4)(A).	Does not address.
b. Date	Time of the Contract. Sec. 3(b).	Any of the prior 3 years. Sec. 4(b)(4)(A).	Does not address.
c. Standard	Relevant Market. Sec. 3(b).	Worldwide Sales. Sec. 4(b)(4)(A).	Does not address.
B. Management of Venture	A management board consisting of one person from each party to the contract. Sec. 3(a)(4).	A management board consisting of one person from each Member of the Venture, and 3 persons representing nonparticipants. Sec. 4(d)(2).	Does not address.

PROVISIONS	H.R. 3393	H.R. 1952	H.R. 108
C. Products of the Venture			
1. Technology	Parties shall retain title to all patents, inventions and information; entitled to an irrevocable, nonexclusive license to all patents obtained; entitled to use results of the R&D which may include: (1) exclusive access to information for up to 3 years; (2) royalty-free licenses or at royalty rates; (3) a share of the royalties collected from nonparties. Sec. 3(a)(7).	The Venture shall receive title to all patents, inventions and know-how; any firm entitled to all patents and know-how; participants <u>may</u> have: (1) exclusive addess to the <u>technology</u> for up to 3 years; (2) royalty-free licenses or at royalty rates; (3) a share of the royalties collected from non-parties. Sec. 4(e).	Does not address.
2. R&D Results	Parties entitled to the results of the research for up to 3 years. Sec. 3(a)(7)(C).	Parties may provide for exclusive use of the results of the research for a reasonable time. Sec. 4(c)(3)(D).	Does not address.
3. Non-Participants	Licenses shall be made available to any other domestic person, on such terms as the parties may agree, not later than 3 years after parties receive licenses. Sec. 3(a)(7)(D).	Licenses shall be made available to any other U.S. firm on such terms as the participants may agree, <u>except that the nonparticipant Members of the Board shall review and affirm that the terms are reasonable, fair and nondiscriminatory</u>.	Does not address.
D. Term of Venture	May not exceed 15 years. Sec. 3(b)(3).	Not longer than 10 years. Sec. 4(c)(4).	Does not address.

PROVISIONS	H.R. 3393	H.R. 1952	H.R. 108
E. Notification	Not more than 30 days, after making a contract or amending one, shall submit to the Attorney General: (1) Notice of the date of the contract; (2) Name of the parties to the contract; (3) Description of the R&D project to be undertaken; (4) Names of the parties undertaking the R&D project; (5) Any other information required by the Rules issued by the Attorney General. Sec. 4.	Venture shall notify the Attorney General of its formation, in a form prescribed by the Attorney General and shall include: (1) Identification of the parties to the Venture; (2) Description of the R&D to be undertaken; (3) Identification of the participants in the R&D; (4) Any agreements pertaining to the Venture; (5) A statement of Compliance with the Act's criteria of a Qualified Venture. Sec. 5.	Two or more persons may request the Attorney General to issue a certificate of review within 60 days, that the conduct specified in the application does not violate the existing antitrust laws. If the Attorney General determines that the specified conduct violates the antitrust laws, a certificate shall be denied, and the applicant notified.
F. Investigation by Attorney General	The Attorney General may investigate under stated criteria, and must notify the parties to the contract of the action. The Attorney General must notify the parties of his determination that the venture violates this Act. This determination shall not be admissible in any subsequent Antitrust action. Sec. 5.	The Attorney General may investigate under stated criteria, and must notify the parties to the venture of the action. Further, if the Attorney General determines that the venture violates the Act, the parties must be notified, and they have 60 days to take corrective actions. If it fails to do so, the Attorney General shall commence an action to dissolve the venture, and if found by the court, it shall be dissolved. This determination shall not be admissible in any action under the Antitrust laws. Sec. 7.	If at any time Attorney General determines that the conduct engaged in under the certificate violates the antitrust laws, shall give notice, and revoke certificate within 30 days after notice.

PROVISIONS	H.R. 3393	H.R. 1952	H.R. 108
G. Immunity Obtained	No person shall be liable under the Antitrust laws for: (1) attempting to enter into (2) entering into (3) carrying out a contract, if notice is given to the Attorney General and the contract conforms to the provisions of the Act. Sec. 3(a).	The Venture, or its employees, or the participants and its employees, shall not be subject to a civil or criminal action under the Antitrust laws, if the venture complies with the Act and notice is given to the Attorney General. Sec. 6.	None of the persons to whom a certificate of review is issued shall be subject to a criminal action, or liable for damages in excess of actual damages, if the violation arises from conduct specified in the certificate and the certificate is in effect.
Non-Qualified Venture	Only actual damages may be awarded. Sec. 7.	Treble damages could be obtained. Sec. 6(1).	Treble damages could be obtained. Sec. 4.
H. Attorney's Fees	May be awarded to the defendant. Sec. 8.	May be awarded to the defendant. Sec. 6(2).	May be awarded to the defendant. Sec. 9(b)(2).
I. Study of Effect	Not later than 18 months after date of enactment, the Attorney General shall report on any recommendations to achieve the purposes of this Act. Sec. 9.	None	None

Mr. WALGREN. Thank you very much, Mr. Sensenbrenner.

Are there other members on the panel who would like to make any opening comments?

Mr. MINETA. Mr. Chairman.

Mr. WALGREN. Mr. Mineta.

Mr. MINETA. Thank you very much, Mr. Chairman.

Mr. Chairman, without a doubt, the future of our Nation's businesses and the economic security of this country will be determined to a great extent by the ability of our industries and regulatory bodies to adapt to the challenges of world trade.

Today, economic competition must be analyzed in two distinct, albeit interrelated levels: One, domestic competition and the other foreign competition. The demands of domestic competition are well known and the rules which govern this competition are well established.

Our antitrust laws were born of domestic problems and have served an important function in our domestic market. The demands of foreign competition, however, cannot be met by our old domestic strategies. Even if we were to decide that our current laws and regulations would serve us well in a world trade context, we do not have this choice.

Obviously, we cannot regulate the economic activities of other nations, and therefore, must adapt our laws to the realities of the world market.

One of the most serious challenges from foreign competition facing our companies today is the challenge to our lead in technical innovation. The United States has always been a leader in development and thus in world trade.

However, this lead is being quickly eroded by foreign competitors who play by different rules. Joint pooling of research efforts is a hallmark of Japanese industry. Pooling resources avoids unnecessary duplication of efforts and is an efficient way to conduct R&D.

It has become clear to many of us that U.S. companies could benefit from collective research in early stages of R&D. The United States is also faced with limited resources and a need to avoid duplication of effort.

However, many companies are prevented from joining with other companies to conduct joint research because of the fear or antitrust liability and treble damage suits.

Representatives Don Edwards, Henry Hyde, and I have introduced legislation, H.R. 108, which would provide limited antitrust immunity to companies wishing to conduct collective research. This bill, which is pending before the House Judiciary Committee, would authorize the Department of Justice to issue certificates of review to coventurers for R&D purposes.

A certificate would shelter the coventurers from criminal action or treble damages. This legislation would thus allow companies to pool their knowledge without threat of criminal antitrust action.

It is important, however, that we do not throw out the baby with the bath water. Any change in our antitrust laws to accommodate the demands of the world market must be carefully crafted to ensure that the American consumer and domestic competitors are not denied the protections that the laws were originally designed to provide.

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H.R. 108 would provide the necessary immunity for joint research, while still providing the American consumer and domestic competitors with remedies against anticompetitive practices. Under the provisions of H.R. 108, a private antitrust suit may be brought for actual damages attributable to anticompetitive conduct on the part of the coventurers.

Also, the Attorney General would be able to revoke a certificate if joint venture partners were not operating within the restrictions of the certificate.

We are honored to have today three distinguished Members of the Congress who will be presenting a different approach to this problem. I look forward to hearing from them.

One, Ed Zschau, I have known for a number of years. Ed comes from our high technology area of the Silicon Valley. Ed and I share the representation of that area and from his own distinguished professional background as an entrepreneur who built from scratch a very successful company, I know that he brings to all of us a great deal of professional expertise and commonsense approach to a number of these issues and I look forward to his leadership in coming forward with a viable solution to facing our foreign trade problem.

Thank you very much, Mr. Chairman.

Mr. WALGREN. Thank you, Mr. Mineta.

Before we start, at this time I would like to have Congresswoman Lloyd's statement inserted into the record.

[The prepared statement of Mrs. Lloyd follows:]

TESTIMONY OF THE HONORABLE
MARILYN LLOYD BEFORE THE

SUBCOMMITTEE ON SCIENCE, RESEARCH AND TECHNOLOGY
COMMITTEE ON SCIENCE AND TECHNOLOGY

HEARINGS ON H.R. 1952 AND H.R. 3393
JOINT VENTURES ACT

JULY 12, 1983

MR. CHAIRMAN AND DISTINGUISHED MEMBERS OF THE SUBCOMMITTEE ON SCIENCE, RESEARCH AND TECHNOLOGY, IT IS A PLEASURE TO APPEAR BEFORE YOU TODAY TO DISCUSS AN AREA OF GREAT INTEREST TO ALL OF US. THERE ARE SEVERAL SIGNIFICANT INSTITUTIONAL BARRIERS THAT UNDULY RESTRICT PROMISING PRIVATE R&D PROGRAMS AND ACTIVITIES, AND I BELIEVE THAT IT IS WELL WORTH OUR WHILE TO CLOSELY EXAMINE THE POLICY RAMIFICATIONS IN ONE KEY AREA -- THE IMPACTS OF OUR FEDERAL ANTITRUST LAWS.

AS MY FELLOW COLLEAGUES ON THE SCIENCE AND TECHNOLOGY COMMITTEE ARE AWARE, THIS COMMITTEE HAS ALWAYS LED THE WAY IN HELPING OUR NATION MAINTAIN ITS WORLD TECHNOLOGICAL LEADERSHIP. WE MUST NOW AGAIN FACE THE TASK OF MAINTAINING THIS LEADERSHIP AND PREPARING FOR OUR FUTURE INDUSTRIAL SOCIETY. I APPLAUD YOU, MR. CHAIRMAN, FOR SCHEDULING THESE

MOST IMPORTANT HEARINGS TODAY TO EXAMINE THE VARIOUS JOINT RESEARCH VENTURE PROPOSALS PRESENTLY BEFORE THE SUBCOMMITTEE.

MR. CHAIRMAN, THIS COUNTRY MUST BEGIN TO MOUNT A COHERENT RESPONSE TO THE CHALLENGE OF JAPAN INC. OR WE SHALL BECOME SECOND RATE, PARTICULARLY IN CRITICAL INDUSTRIES WHICH THE JAPANESE HAVE TARGETED FOR WORLD DOMINANCE IN THE EIGHTIES. THIS NATIONAL RESPONSE MUST BE AN INTEGRAL ELEMENT OF AN OVERALL STRATEGY TO SMOOTHLY TRANSITION THE UNITED STATES TO A HIGH TECHNOLOGY SOCIETY WHILE RETAINING OUR INTERNATIONAL COMPETITIVENESS ACROSS THE BOARD. SUCH A STRATEGY MUST ALSO RECOGNIZE THE NEED TO TURN AROUND WHAT HAS BECOME AN ALARMING DECLINE IN U.S. PRODUCTIVITY.

IN RESPONSE TO THIS CHALLENGE, I HAVE BEEN PLEASED TO INTRODUCE LEGISLATION RECENTLY WITH MY DISTINGUISHED COLLEAGUE FROM WISCONSIN, MR. SENSENBRENNER. OUR LEGISLATION, THE "HIGH TECHNOLOGY R&D JOINT VENTURE ACT OF 1983", WOULD ENCOURAGE INDUSTRIAL R&D JOINT VENTURES BY PROVIDING RATIONAL PROTECTION FROM FEDERAL AND STATE ANTITRUST LAWS. IT WOULD HELP OUR NATION MOVE FORWARD IN DEVELOPING MANY NEW AND EXCITING HIGH TECHNOLOGIES IN SUCH AREAS AS SEMICONDUCTOR CHIPS, MICROPROCESSORS AND SUPERCOMPUTERS, ROBOTICS AND NEW ENERGY TECHNOLOGIES. JUST RECENTLY, DR. ALICE RIVLIN, THE DIRECTOR OF THE CONGRESSIONAL BUDGET OFFICE, TESTIFIED BEFORE MY SUBCOMMITTEE ON ENERGY RESEARCH AND PRODUCTION ON THE NEED TO RELAX THE ANTITRUST

RESTRAINTS CURRENTLY HINDERING PRIVATE ENERGY R&D PROJECTS.

IN CONTRAST TO THE JAPANESE POLICY, THE UNITED STATES DOES NOT HAVE A MITI-TYPE ORGANIZATION TO UNDERWRITE AND COORDINATE INDUSTRIAL ACTIVITY. YET WE CONTINUE TO INSIST ON APPLYING THE "OUT-MODED SHACKLES" OF ANTITRUST REGULATION TO PROMISING R&D PROGRAMS. OUR COUNTRY HAS FOR TOO LONG TAKEN AN ARCHAIC VIEW OF WHAT CONSTITUTES ANTI-COMPETITIVE MEASURES OR PROTECTIONIST PRACTICES. THIS RESTRICTIVE, OUT-DATED POLICY CAN ONLY FURTHER LIMIT OUR ABILITY TO COMPETE IN TOMORROW'S MARKETPLACE.

WE MUST NOW TAKE AN INNOVATIVE AND DARING APPROACH TO UNLEASHING THE MOST CREATIVE MINDS IN INDUSTRY, OUR UNIVERSITIES AND THE GOVERNMENT. IN A RECENT REPORT ENTITLED, INTERNATIONAL COMPETITION IN ADVANCED TECHNOLOGY DECISIONS FOR AMERICA, A PRESTIGIOUS NATIONAL RESEARCH COUNCIL PANEL POINTED OUT THAT WE MUST "ACT NOW" TO PRESERVE OUR BASIC CAPACITY TO DEVELOP AND USE NEW ADVANCED TECHNOLOGIES. THIS REPORT CLEARLY INDICATED THAT IT IS IN OUR NATION'S BEST INTERESTS TO ENSURE THAT WE MAINTAIN A HEALTHY R&D ENVIRONMENT FOR OUR FUTURE GENERATIONS.

THE LEGISLATION WHICH WE HAVE INTRODUCED IS A SIGNIFICANT STEP IN THIS DIRECTION. OUR LEGISLATION PROVIDES A "SELF-CERTIFICATION" APPROACH IN ORDER TO PERMIT INDIVIDUAL FIRMS TO JOINTLY PERFORM HIGH TECHNOLOGY R&D. THIS APPROACH

IS THE MOST PRUDENT COURSE TO FOLLOW IN MINIMIZING BUREAUCRATIC APPLICATION PROCEDURES. IT ALSO OFFERS THE DEPARTMENT OF JUSTICE THE NEEDED FLEXIBILITY TO EXAMINE IN MORE DETAIL ANY VENTURE THAT WARRANTS ADDITIONAL ATTENTION.

OF SIGNIFICANT IMPORTANCE, AND PERHAPS THE MOST IMPORTANT PROVISION, IS SECTION 7 OF OUR BILL, WHICH MODIFIES THE CURRENT ANTITRUST PROVISIONS DEALING WITH THE AWARD OF TREBLE DAMAGES IN PRIVATE ANTITRUST SUITS. UNDER OUR LEGISLATION, NO HIGH TECHNOLOGY R&D VENTURE WOULD BE LIABLE FOR AN AMOUNT IN EXCESS OF ACTUAL DAMAGES IF IT FAILED TO MEET THE REQUIREMENTS OF OUR BILL AND WAS SUBSEQUENTLY FOUND IN VIOLATION OF THE FEDERAL ANTITRUST LAWS. I FEEL THAT THIS PROVISION IS CRITICAL, AND I UNDERSTAND THAT THE AREA WAS THE SUBJECT OF A GREAT DEAL OF DISCUSSION DURING YOUR RECENT SUBCOMMITTEE HEARINGS ON U.S. INTERNATIONAL COMPETITIVENESS AND JOINT VENTURES.

MR. CHAIRMAN, RESEARCH AND DEVELOPMENT HAS ALWAYS BEEN ONE OF THE PRIMARY BASES ON WHICH OUR NATION HAS ATTAINED ITS WORLD ECONOMIC STANDING. THE LEGISLATION WHICH I HAVE CO-SPONSORED WITH THE GENTLEMAN FROM WISCONSIN PROVIDES THE TOOLS THAT WILL HELP US MAINTAIN OUR TECHNOLOGICAL LEADERSHIP. IT WILL PLAY AN IMPORTANT ROLE IN HELPING OUR NATION PLAN FOR OUR FUTURE INDUSTRIAL SOCIETY.

AGAIN, I WOULD LIKE TO CONTRATULATE THE DISTINGUISHED CHAIRMAN FOR HOLDING THESE HEARINGS TODAY, AND I LOOK FORWARD TO WORKING WITH YOU AND THE MEMBERS OF THE SRT SUBCOMMITTEE IN THE FUTURE ON THIS AND OTHER IMPORTANT R&D ISSUES.

Mr. WALGREN. Let me also extend a very direct welcome to the colleagues that have come first today to share their perspectives in this area and particularly those that are involved in sponsoring legislation and trying to extend the appreciation of what changes certainly can be recommendable in this area.

Why do we not start with Mr. Synar and just go down the row and follow on with Mr. Wyden and Mr. Zschau.

Mr. Synar.

STATEMENT OF HON. MIKE SYNAR, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OKLAHOMA

Mr. SYNAR. Thank you very much.

First of all, Mr. Chairman, let me congratulate you for holding these hearings today on the issue of joint ventures for research and development. As a member of the House Judiciary Committee and on the Subcommittee on Monopolies, I look forward to following your leadership in pressing forward for some responsible antitrust reform.

I am confident that we can encourage competition through more research and development without undercutting our traditionally strong antitrust laws.

As you know, Ed and Ron and I are original cosponsors of H.R. 1952, the Joint Research and Development Ventures Act of 1983. I am also pleased to note that you and Congressmen Simon, Lundine, and Durbin of this subcommittee have subsequently joined us as cosponsors.

Now, our legislation is based upon three very simple and basic premises: That the United States faces a tremendous challenge to remain the world's leader in technology; that second, the private sector is the best-equipped to meet this challenge; and finally, that an important way in which our Government can help the private sector meet this challenge is to clarify the antitrust laws to dispel the uncertainty that presently discourages private American firms from mounting joint ventures for research and development.

Now, in the United States, since 1962, something has happened which should be of concern to all of us in this room, and that is that research and development as a percentage of gross national product has declined by one-fifth. At that same time in Japan, it has grown by one-third.

Now our Japanese and Western European competitors have adopted national programs to adopt research and development as a part of their national industrial policies.

Mr. Chairman, I reject the notion that Government should be responsible for our national research effort, but I do recognize the reality of our laws and national policies must be reshaped over time to meet this challenging economic need.

There exists a widening gap between the cost of research and development and the ability of small- and medium-sized high-technology companies to keep pace. We face, very sincerely, a real risk that these firms will be unable to compete.

Our bill, H.R. 1952, would establish clear statutory standards to guide the formation and operation of joint ventures for research and development. If the standards are met, the venture would not

be in violation of the antitrust law and therefore would not be subject to the Government antitrust attack or expensive private treble damage litigation.

But it is important to point out that H.R. 1952 does not weaken the penalties for violators. It does not eliminate treble damages for those ventures failing to comply with statutory standards and violating our antitrust laws.

Very simply, it says that if you are legal, we want to give you every opportunity and every incentive to do it, but if you are illegal, we do not want to condone that type of operation, and therefore we want those types of treble damages in there.

The standards for H.R. 1952 are intended to be only a starting point for the debate on what standards it should be. They include that the venture's sole purpose must be research; that the participation be open to all U.S. firms; that all useful know-how be available to all participating firms immediately and within 3 years to nonparticipants; that small business be specially treated in licensing of developed technology by basing royalties on volume and usage.

Now other standards set out in H.R. 1952 define the formation of the venture and set guidelines for operation. I would like to stress that the success of a joint venture legislation hinges on the precision and clarity of the standards. We must enact standards on high technology, with high-technology firms, which these firms can base their actions with legal certainty.

If we do not, we fail to solve the central problem that they face today, and that is the fear of antitrust prosecution will continue to discourage joint ventures for research and development.

Congressman Sensenbrenner, who serves on Judiciary with me, and Mrs. Lloyd, both have introduced legislation which proposes statutory standards, but takes a different approach regarding treble damages. I look forward to working with them in an effort to find maybe a middle ground, a best solution to this whole issue.

Again, Mr. Chairman, I thank you and I thank Mr. Mineta and Mr. Sensenbrenner, all of have been involved in some form of legislation on this. I think it is an issue that this Congress has that is bipartisan and in the really truest nature of giving us that competitive edge which we all seek for this country.

Thank you.

Mr. WALGREN. Thank you, Mr. Synar.

Mr. Wyden.

STATEMENT OF HON. RON WYDEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OREGON

Mr. WYDEN. Thank you very much, Mr. Chairman.

My colleague, Mr. Synar has said it so well that I will just summarize very briefly some additional concerns, and like him, add that I am very grateful to you for giving us this opportunity to testify on this subject. I think there is a growing bipartisan awareness in the Congress that it is just critically important for Congress to encourage collaborative research and development efforts and that the best way to do that is to clarify the application of our antitrust laws to these kinds of ventures.

Although designed to foster competition, our antitrust laws, it seems to me, are having an anticompetitive impact on our ability to compete in the marketplace. More than anything, business executive abhor uncertainty, and that is what we have seen again and again in this area of high-technology development. Firms are hesitant to participate in joint research and development efforts, because under existing law, there is tremendous uncertainty due to the fact that it is impossible to try to predict or any way guarantee that they are going to be insulated, no matter how pure their efforts are, no matter how focused they are in research and development, there is no way to guarantee that they would be insulated from potential antitrust lawsuits.

I think my colleague, Mr. Synar, has made clear once again that because the American economy and the world economy is changing so rapidly, if we are going to keep the Japanese, the Western Europeans and others from closing in on us, we are going to have to make major changes in our research and development initiatives to compete and to grow economically.

Research and development, especially for the new firms, new electronics and information industries, is also very expensive. These are the firms that are plagued by a severe shortage today of qualified scientific and engineering personnel and have to engage in expensive competition for the limited number of technically qualified workers. The fact that there is apprehension and uncertainty about possible antitrust violations has not only discouraged the research and development ventures, but it has resulted in additional expenses for the information-age industries, because they have to go out and, I think, in a very wasteful and duplicative manner, use their scarce capital and personnel.

At the same time, we can contrast it to what was done overseas. Our competitors there have government acquiescence and support and engage in cooperative research and development efforts.

For example, in Japan, their efforts to develop a fifth generation computer are backed by a 10-year, $450 million commitment from the Ministry of International Trade and Industry and is spearheaded by a core group of 40 researchers recruited from throughout the high-technology sector in Japan. So the health of our economy clearly rests on our ability to compete on the global marketplace and if we do not start taking steps to deal with this competition, I think we are going to have big trouble in the years ahead.

I want to just touch for a second, because I think my colleague, Mr. Synar, has said it very well, on exactly what this bill does prescribe, because I think it tries to touch on only three or four key areas and then we remain completely open to negotiation as to how to proceed from that point.

The first is that ventures activities would be strictly limited to research and development. All interested firms in the industry could participate. The market share limitations are placed on both individual participants and on the venture as a whole. Finally, to insure that we focus just on the research and development portion of the economic spectrum and not give commercial advantage to anyone in an inappropriate way, within three years, a nonparticipant, in terms that are reasonable and nondiscriminatory, could gain access to the product of the joint venture.

Any antitrust lawsuit against such a venture could be pursued only if a factual finding was made that the venture had strayed from compliance with the standards set out by the Congress. If such a factual finding is made, at that point the venture completely loses its protection under the bill and would be subject to the traditional treble damages penalty.

Now, I know that we are considering a variety of bills. All our colleagues are trying to get to the same goal and it is a bipartisan effort. I think the key, Mr. Chairman, is going to be to draw a clear line between legal and illegal conduct.

Others, I know, feel that this would be either unwise or difficult to accomplish. The potential litigants should be allowed to collect actual or single damages, that injury based on certain conduct that does not fit neatly into one of those two categories, legal or illegal, can be proved.

While all of us have an open mind, Mr. Chairman, I think we do have to act soon and I hope that would be the focus of our efforts. If we do not do that, if we do not draw a clear line between what is legal and what is illegal, I think the cloud of uncertainty and apprehension that has long discouraged joint R&D ventures is going to continue.

I think the last point that I would make, Mr. Chairman, is that throughout our history, from time to time we have understood that our laws need to be fine tuned to reflect changes in the way the economy operates and the way the global economy operates.

I think this is one of those times. We are no longer a nation of small shopkeepers and simpler times, economic inefficiencies and failure to take advantage of necessary economies of scale by one company work to the advantage of competing firms in an insulated domestic marketplace.

Now, however, such inefficiencies mean that the country as a whole is losing ground to overseas competitors in an increasingly interdependent global marketplace.

I do not think that anyone would suggest that all of us who are sponsoring this legislation want in any way to discuss the subject of price fixing, sinister conspiracies. We want to talk about economic survival in an increasingly technical and increasingly competitive world.

We are going to get the economies of scale that are necessary to compete in that kind of complex, rapidly changing environment and must either permit a few huge integrated enterprises to dominant the markets, or we are going to have to encourage cooperation at the research and development level among a larger number of independent, decentralized firms.

In my view, our system is better served by taking that latter approach.

Finally, Mr. Chairman, let me restress the point that Mr. Synar made, that in no way do we want to undermine the country's basic commitment to the principle of antitrust. We are also not talking about emulating our overseas competitors through the formation of huge new research cartels with direct government participation.

What we are instead talking about is a relatively simple method, particularly if we can define legal and illegal conduct, of clarifying and not amending existing antitrust law that addresses the reali-

ties of the modern international business environment and allows our companies to compete successfully in that environment.

Mr. Chairman, again let me thank you for holding these hearings. We are very grateful to have you as a cosponsor of this legislation and very much look forward to working with you and our other colleagues on this important issue in the days ahead.

Thank you.

Mr. WALGREN. Thank you, Mr. Wyden, we appreciate those thoughts.

Mr. Zschau.

STATEMENT OF HON. ED ZSCHAU, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. ZSCHAU. Thank you, Mr. Chairman. Good morning. I appreciate not only the opportunity to be here, but also appreciate the kind words from my friend and colleague, Norm Mineta, who represents the Silicon Valley so well with me.

I have prepared a written statement for the committee which I hope would be included in the record.

Mr. WALGREN. Without objection.

Mr. ZSCHAU. I have appended to the front of that statement a summary of what is inside. I intend to just highlight some areas in that summary that have not been covered by Ron and Mike earlier.

I am going to take a somewhat different tack on this. We have been focusing our discussion about the need for research and development joint ventures in order to enable our technology companies to compete against foreign competition, and that is acknowledged.

The cost and the risk of developing in the expanding areas of technology are growing. We are facing stiff foreign competition. There is a scarcity of trained technical people so we have got to get the most leverage we can out of them.

But I think there is another point that maybe we forget when we focus the discussion around the high-technology companies, and that is that we have today that same sort of competition facing our more mature industries, our so-called smokestack industries. There are those in this country who are willing to write those off and go full bore with the high-technology companies. I am not one of those.

President Reagan recently appointed a Presidential commission, or announced that he has appointed a Presidential commission that will be chaired by one of my Silicon Valley constituents, John Young, the president of Hewlett-Packard Co. This Presidential commission is designed to get ideas about how to make our industrial competitiveness improve over time; not just in the high-technology industries, but throughout our whole economy.

My hunch is that the application of technology will be one of the major solutions to making our more mature industries competitive once again and I also feel that joint research programs, in order to apply that technology or develop new products, may be a way in which automobiles, steel, durable goods, those industries that some in this country have written off, can once again retain their competitive edge and be rejuvenated.

If this is true, that is, if R&D joint ventures may provide part of the solution for the more mature industries as well as high-technology industries, we want to make sure that what we do in this legislation takes that into account.

The specific approach of H.R. 1952, of which I am a cosponsor, I think is an excellent approach because it defines specific conditions under which a competitive atmosphere would be maintained. But I am wondering, as I think about the other industries that might use R&D joint ventures, whether the model, which was really developed by MCC, Microelectronics & Computer Technology Corp., would apply to those other industries, whether the specifics of that situation, whether the specifics of the computer industry, would apply to these other industries.

My feeling is that perhaps those conditions are too restrictive. Perhaps they would not permit the sort of R&D joint ventures to be formed by the other sectors of business that could profitably use them. In fact, the requirement, for example, to license other competitors within 3 years, although in high technology, where technology is changing so fast, it may be a very appropriate approach.

In other sectors where technology does not change so fast, that requirement to license one's competitors, including U.S. subsidiaries of foreign competitors, may discourage companies from forming such a research joint venture under those restrictive conditions.

As a result, what I would like to suggest to the committee in considering this important legislation is perhaps a more flexible approach. I am not sure whether this approach has merit.

I am currently analyzing it and I am just proposing it as another way to attack the same problem, an approach which would not lay down specific conditions under which an R&D joint venture is either legal or illegal, but to require such joint ventures when they are formed to, on a file-and-use basis, register with the Attorney General and say this is what our business purpose is, these are the participants, to provide the kind of information that would describe the R&D joint venture.

Then, to modify the antitrust law to make a formation of such an R&D joint venture not a per se violation of antitrust law, that is, rule of reason. The fact that the operations of this joint venture would be anticompetitive would be the only grounds for suit, either private suit or Government suit, and to restrict the remedies of those suits to injunctive relief only. That is, if a private concern felt that it was being unfairly treated because it could not receive licenses to the development of the products or technology of the R&D joint venture, that it could sue for injunctive relief or for the opportunity to get a license.

The reason why this approach may make some sense is that rather than laying down specific conditions, it says that the fact of the joint venture being anticompetitive that would be the only grounds under which one could sue it, not just the formation of the joint venture, and it would take away the lure in these particular cases of treble damages which have caused some fear in the hearts of those who have formed R&D joint ventures.

So in conclusion, Mr. Chairman, let me just suggest that there is no doubt that we need to have legislation that permits the formation of R&D joint ventures. My hope is that the legislation will

permit not only those in high-technology industries, but in our more mature industries where we need to maintain our trade competitiveness and save the jobs in those industries.

A flexible approach of eliminating R&D joint ventures as a per se violation of antitrust and restricting the remedies to injunctive relief only may be the kind of formula that permits a wide variety of such ventures to be formed.

I appreciate the chance to be before you, Mr. Chairman, and I welcome questions from you or members of the committee.

[The prepared statement of Mr. Zschau follows:]

A STATEMENT BY

ED ZSCHAU

MEMBER OF CONGRESS

BEFORE THE

SUBCOMMITTEE ON SCIENCE, RESEARCH AND TECHNOLOGY

JULY 12, 1983, ON

Legislation to Encourage Research and Development Joint Ventures

Summary:

1. R & D joint ventures could be an important vehicle to increasing U.S. industrial competitiveness.

- Needed R & D is often too expensive or too risky to be pursued by individual companies;
- The scarcity of trained technical personnel in the United States requires that we avoid duplication of efforts and get the most out of our available technical talent;
- U.S. companies are facing intense competition from business consortiums in other countries which are encouraged (and sometimes subsidized) by their governments;
- Joint R & D programs may enable ailing companies in our so-called "smokestack" industries to solve common problems and save jobs through increased competitiveness.

2. Today, companies are reluctant to do joint R & D work because of the lack of clarity of antitrust laws and the risk of unjustified suits.

3. H.R. 1952 would eliminate the antitrust risk for a class of R & D joint ventures while requiring strict conditions to ensure competition.

4. The conditions required by H.R. 1952 may be too restrictive and may discourage some needed R & D joint ventures from forming.

5. Congress should consider a more flexible approach to encourage R & D joint ventures by restricting the basis and remedies for antitrust actions that could be brought against them.

A STATEMENT BY

ED ZSCHAU

MEMBER OF CONGRESS

BEFORE THE

SUBCOMMITTEE ON SCIENCE, RESEARCH AND TECHNOLOGY

July 12, 1983, on

Legislation to Encourage Research and Development Joint Ventures

Mr. Chairman, I appreciate the opportunity to appear before your distinguished subcommittee this morning to discuss legislation needed to encourage research and development joint ventures. I commend you for holding this and other hearings seeking insight into how the United States can maintain its technological leadership and increase its industrial competitiveness.

My congressional district--a region in Northern California often called "Silicon Valley"--has had an outstanding record in advancing technology and creating new jobs. It has done so through an effective combination of entrepreneurship and advanced research and development. Currently, there are approximately 700 high technology firms in and around my district in fields ranging from microelectronics to genetic engineering.

Although our past achievements in technology have been inspiring, we can't afford to relax. The rate of technological change worldwide is accelerating. If we are to fulfill President Reagan's commitment to "keeping America the technological leader of the world now and into the 21st Century" we'll have to increase our research and development efforts in this country.

R&D JOINT VENTURES ARE NEEDED

The further and faster we push the limits of our knowledge and our technologies, the costlier and riskier those R&D efforts become. For example, increasing the speed and densities of microelectronic circuits by a significant multiple now may require resources and involve risks that no single U.S. company can afford. However, several companies might be able to pool some of their research resources, share the risk of such a project, and help keep dominance in microelectronic technology here in America.

A major obstacle to maintaining our technological leadership in the coming years is a projected scarcity of trained technical personnel in the United States. The future demand for engineers and technicians is predicted to outstrip the supply by a wide margin due to a capacity shortage in our college-level science and engineering programs. The American Electronics Association has forecast an annual shortfall of 16,000 electrical engineers and computer scientists through 1987--that's 90,000 unfilled technical positions.

While we must initiate immediately actions to expand our technical education system, getting results will take time. In the meantime, we must find ways to avoid duplication of technical effort and get the most out of our scarce technical talent. Pooling research resources from several companies in R&D joint ventures would be an effective way to increase the results they could obtain from the available technical personnel.

Over the next decade, America's dominance in the computer

industry will be challenged from abroad. The challenge will come from Japan. In 1981, after three years of extensive planning, the Japanese government announced a national project designed to make Japan number one in the computer industry by the late 1990s. It's a project to develop a 5th Generation Computer--a machine so advanced in hardware and software that it will be able to "reason with knowledge" like a human being rather than just computing with numbers or processing information. The Japanese research program, involving a consortium of companies coordinated by the Japanese government, could ultimately cost a billion dollars over ten years.

A concerted, team effort will be needed for the U.S. computer industry to meet this competitive challenge. However, a project to develop a 5th generation computer is simply too large and too daring for an individual company (with the possible exception of IBM) to justify pursuing alone. Clearly, R&D joint ventures will be needed.

Recently, President Reagan announced the formation of a Presidential Commission on Industrial Competitiveness. It will be chaired by one of my Silicon Valley constituents, John Young, President of the Hewlett-Packard Company. The objective of the Commission is to determine how the United States can improve its competitiveness and world market share in not only those industries, such as technology, where we are currently competitive, but also in those so-called "smokestack" industries where we have lost our competitive edge.

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I believe that the ailing companies in our mature industries can be rejuvenated. I believe that application of technology and new approaches to those industries will play a major role in making them more competitive. Although it may be difficult for them to overcome their common problems working alone, pooling resources in R&D joint ventures to seek solutions may be feasible. In fact, it may be the only way, without government intervention, for these companies to become competitive again and save their jobs.

COMPANIES ARE RELUCTANT TO FORM R&D JOINT VENTURES

Despite the many advantages of joint R&D programs, U.S. companies are reluctant to pursue them. The antitrust laws regarding such entities are unclear and the risks of unjustified antitrust suits are too great. Imagine the reaction if the major automobile companies formed a joint venture to conduct research on a new, fuel efficient car or the major steel companies formed an R&D joint venture to develop more efficient production processes or new speciality steel products. Although such joint projects might be in our national interest and increase competition, they would appear to fall within the scope of antitrust legislation and be subject to litigation. With the uncertainty of their legality and the spector of treble damages, it's no surprise that such joint projects are not pursued and seldom even proposed.

A recent example illustrates the disincentives to forming R&D joint ventures. The visionary chairman of Control Data Corporation, William Norris, recognizing the competitive threat to America's computer industry posed by consortiums of companies

from abroad, formed an R&D joint venture--Microelectronics and Computer Technology Corporation (MCC)--to develop advanced computer hardware and software technology. Even though detailed conditions to ensure competitiveness (e.g. the joint venture would be open to all industry participants and the results available to any company under license) were written into its by-laws and its formation was "blessed" by the Justice Department, the MCC founders soon received a letter from San Francisco attorney Joseph Alioto (attached) putting MCC on notice that its continued operation could trigger an antitrust action and possible treble damages. Although Norris and the other MCC participants were not deterred by this threat, the risk of a costly and time-consuming antitrust action, no matter how unjustified, must be added to the already large technical and market risks in their daring project.

If we are to encourage the formation of R&D joint ventures in order to maintain technological leadership and improve the competitiveness of U.S. companies, we must make appropriate changes in our antitrust laws. However, when we do we must also be careful to avoid creating opportunities for abuse.

H.R. 1952 WOULD ELIMINATE ANTITRUST RISKS WHILE ENSURING COMPETITIVE CONDITIONS

H.R. 1952 specifies a series of conditions which, if met by R & D joint ventures, would give them immunity from any antitrust action. The conditions are modeled on the by-laws of MCC. Namely,

- The joint venture's sole activity shall be the operation one or more research and development programs;
- Participation in the joint venture or in any of its projects shall be open to any U.S. firm which desires to participate and on the same terms applicable to other participants, provided that Justice Department approval would be required for a firm which accounts for more than 25 percent of the worldwide market for the relevant product where its participation would cause the combined share of all project participants to exceed 50 percent. In addition, U.S. subsidiaries of those foreign firms which afford American companies equivalent access to their research projects would be eligible to participate;
- Participants shall not be subjected to any unnecessary collateral restraints that are clearly unrelated to the achievement of the venture's purpose;
- A management board composed of at least three nonparticipant representatives shall have ultimate authority for management of the venture;
- All inventions and useful know-how shall be promptly reported and licensed to participant firms, and within 3 years to nonparticipants on reasonable and nondiscriminatory terms approved by a majority of the nonparticipant board

representatives.

The approach of H.R. 1952 has a great deal of merit. It removes entirely the risk of antitrust action to a qualified R & D joint venture. At the same time, its hard to imagine an R & D joint venture that abides by these conditions having anything but a positive effect on the competitive environment.

THE CONDITIONS OF H.R. 1952 MAY BE TOO RESTRICTIVE

Despite its obvious merit, the approach of H.R. 1952 has one disadvantage: the conditions it places on the R & D joint ventures may be too restrictive to permit some perfectly appropriate joint ventures to qualify. Also, the conditions may even discourage some potentially valuable joint ventures from forming.

It's difficult to specify in advance specific conditions that ensure a competitive environment. That's why antitrust law is based on broad principles applied by the courts to specific situations rather than on rigid criteria. However, H.R. 1952 attempts to define such criteria. Although the conditions in H.R. 1952 might be very appropriate for MCC or even the U.S. computer industry, they may not apply well at all to the many other business sectors in which it would be advantageous to form R & D joint ventures. Moreover, even in the computer industry, it's possible that less restrictive conditions would still ensure a fair, competitive environment.

Also, some of the conditions of H.R. 1952 may be disincentives that would discourage certain companies from

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forming R & D joint ventures at all. For example, the requirement to license the new technology to other companies after three years may make the risk/reward relationship unattractive for prospective joint venture participants, particularly if this means licensing the U.S. subsidiaries of foreign competitors.

A FLEXIBLE APPROACH RESTRICTING THE BASIS AND REMEDIES OF ANTITRUST ACTION SHOULD BE CONSIDERED

Mr. Chairman, I would like to propose another approach to encouraging R & D joint ventures that would provide greater flexibility than H.R. 1952. Although a detailed analysis of its implementation and its implications would have to be done before a conclusion on its merits could be reached, I'm hopeful that this approach will also be discussed as the consideration of H.R. 1952 proceeds.

Today, the inordinate antitrust risk of forming legitimate R & D joint ventures stems from two sources:

(1) The fear that the mere act of forming such entities by industry competitors may be illegal and

(2) The lure of treble damages for enterprising private attorneys to bring unjustified suits.

The following changes to current antitrust law would reduce substantially the antitrust suit risk while still preserving appropriate actions and remedies under antitrust law to prevent anticompetitive abuses.

(1) All R & D joint ventures would register with the Justice Department on a "file and use" basis, providing information about the participants and the purpose.

(2) Such R & D joint ventures would not be deemed to be per se violations of antitrust law; any antitrust actions against them would have to be based on "rule of reason" with the plaintiff proving anticompetitive results from the operations of the joint venture.

(3) Remedies in such suits, either private or government, would be restricted to injunctive relief and court costs.

This approach would permit the formation of the joint ventures in the form most appropriate to the industry circumstances rather than requiring the MCC model to be followed rigorously. It would make actual anticompetitive results the only basis for private or government antitrust action, and, in limiting the remedies to the correction of those results, it removes the incentive for nuisance suits.

Mr. Chairman, in summary I believe encouraging R & D joint ventures in a variety of industries is critical to improving our industrial competitiveness and creating jobs. Changes in our antitrust laws are needed. In addition to the excellent approach of H.R. 1952, I recommend that other more flexible approaches also be considered.

Thank you for your kind attention. I'd be delighted to answer any questions you might have.

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FEB 2

January 27, 1983

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Mr. Gerald Probst, Chairman
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Gentlemen:

In an article which appeared in the January 25th evening edition of the San Francisco Examiner, a copy of which I am enclosing, it is reported that your respective companies intend to form a combine to regulate research, development and innovations in the "microelectronics and computer" industry, and that your companies are capitalizing this venture with "initial" contributions of $50 to $100 million.

As an attorney whose practice has been limited to antitrust litigation, I wish to advise you that, in my opinion, your contemplated conduct is an unequivocal combination in violation of the antitrust laws of the United States. The effect that your agreement will have upon competition and innovations in

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the otherwise dynamic and exponentially expanding electronics industry is obvious--not to mention the destructive impact on the establishment of new submarket industries and jobs. Equally clear is the purpose of your cartel, which anyone could plainly deduce even without the gratuitous remarks ascribed to Mr. William Shaffer about how your group would have restricted the development and invention of the wheel.

The reported "clearance" letter from the Antitrust Division of the Department of Justice is not remarkable. Even a student of the antitrust laws knows that the present Antitrust Division, under the aegis of Mr. William Baxter, has abdicated its historical responsibility to enforce the law by purposefully refusing to prosecute clearly unlawful price-fixing agreements, approving the most egregious mergers our country has ever had to tolerate, advocating the suppression of innovations by large companies if it is in their economic interest to do so, dismissing meritorious antitrust suits throughout the country or otherwise entering into consent decrees or settlements which amount to nothing more than imperceptible slaps of the hand, and filing countless amicus curiae briefs in favor of adjudicated antitrust violators. It is patently clear to any impartial observer that the Antitrust Division believes that the "benefits" derived from concentrations of economic power in the hands of combines should be substituted for competition, the infusion of capital to build new factories and refineries and the creation of new jobs and industry.

As you must know, or at least do now, a "clearance" letter from the Antitrust Division is not an authorized grant of immunity from private antitrust enforcement. Neither the Courts, the law nor private parties are the least bit bound by Mr. Baxter's philosophy of what the antitrust laws should say or how they should be interpreted.

I do not know how, where or in what manner your companies, all competitors, managed to get together and discuss, much less agree upon, how research and development in the electronics industry will be controlled and allocated. Indeed, the mere fact that your companies utilized some non-apparent lines of communication is itself startling and would, with any other Antitrust Division, be more than enough to conduct a grand jury investigation to ascertain what these avenues are, how long they have existed, and what matters were discussed. But however disturbing it may be to know that such lines of communication

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exist, that fact is not nearly so astonishing as the fact that your companies were able to utilize those lines to the extent of reaching such an agreement as the one reported in the newspaper.

I respectfully submit to you that your company should reconsider the advisability of your action and abandon your anticompetitive plans. I submit to you that your company should maintain its dignity by refusing to join the combine, and instead spend the money you were going to contribute on your own projects. I submit that you should not be afraid of competition, and that you should respect our free enterprise system, knowing that in the long run it will be to the benefit of your company, as well as to the benefit of the people and the country as a whole. Indeed, as you must know, all of the great inventions and innovations which our country has brought to the world were the result of two or more companies or individuals independently working on the same projects and racing against each other to come up with something new, exciting and useful first. Because of that competition, products and processes were developed faster, cheaper and better than they otherwise would have been. It would be terrible if this competitive activity were restrained in any industry. It would be unforgiveable if it happened in electronics.

If your company nonetheless chooses to proceed with the combination, then at least you do so with full knowledge of the potential consequences.

Sincerely,

Joseph M. Alioto

Joseph M. Alioto

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Mr. WALGREN. Thank you very much. How is the best way to proceed?

Mr. Sensenbrenner.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman.

I appreciate the three of you coming to appear before us today to talk about H.R. 1952, and I think the introduction of my legislation makes it quite clear that I believe in the approach of clearly setting out what guidelines qualify a joint venture for some antitrust immunity, rather than leaving it up to the whim of some bureaucrat in the Justice Department, which is the approach taken by the Edwards, Hyde, Mineta bill, no derogatory statements directed toward the gentleman from California.

But I would like to ask a couple of questions and make a couple of points relative to when the antitrust immunity begins to apply and the whole issue of treble damages versus actual damages.

As my colleague from Oklahoma, Mr. Synar, knows, the Judiciary Committee's hangup on treble damages has diminished quite a bit in recent years because we did report out a shipping act that provides for actual damages for illegal activity under the act rather than treble damages, which it has been in the past.

But it seems to me that one of the very critical issues that has got to be addressed in this legislation is the granting of an antitrust immunity as people are trying to get together a joint venture. Some of these meetings will succeed and the joint venture will be developed; others, unfortunately, will fail and there will be no joint venture started out.

Under both of our bills, a joint venture has got to be submitted to the Justice Department for review before the antitrust immunity attaches. Under my bill, merely getting together to try and put together a joint venture does not violate the antitrust laws. Your bill does not do that and I am afraid that your provisions would have a chilling effect on people getting together if they know they are not going to succeed. Together with the fact that there will be triple damages for someone who gets together, does not succeed, and it is determined that what they were talking about was outside the definitional parameters of the legislation involved.

Could either of you three gentlemen comment on this particular problem on what happens with the failed negotiations for a joint venture that might have been outside the parameters of the act? Do you think that that would put the break on doing the job that I think we all want to accomplish?

Mr. SYNAR. Well, Jim, to be honest with you, I think that your observations are correct. We could have a potential problem of a chilling effect and I think it is something that we need to look into.

You are aware, as I am, that the Judiciary Committee is going to look at the whole question of treble damages sometime this year just as a separate issue to see whether or not we ought to do it.

Concerning whether or not there will be that chilling effect, and when do those discussions end and cause the problem, whether they are treble damages or single or actual damages, is an issue which we would have to clearly outline, clearly outline in the standards. Your approach and Mrs. Lloyd's approach and our approach is very similar on that. We would prefer to set down stand-

ards very clearly outlined so that there is no confusion. There is clarity; there is precision.

Within writing those, hopefully we could draw those types of lines. Barring that, I am not sure whether or not the types of damages that would occur if you violate those guidelines and parameters is going to be a discouragement or encouragement to go any farther or shorter.

But I do not think your approach or your comments are unreasonable at all. That is why I think that we are in the ball park here.

Mr. SENSENBRENNER. I yield back——

Mr. WYDEN. Let me follow up if I might for a second, Jim.

Mr. SENSENBRENNER. OK.

Mr. WYDEN. Our bill is silent on this point of what happens when persons just try to get together and fail. I, like Mike, feel yours is a reasonable suggestion and very much in the ballpark as something that could be worked out.

Let me go to the treble damages question and this question of remedies, as well. As you can see, the three of us are all straining to try to come up with something that is workable. It is going to have to be a compromise between the approaches the administration has looked at, our bill, your bill, all the various things that are on the table.

The one thing that concerns me is that because I see so fundamental to this issue the uncertainty among business executives as to whether or not to do this at all, I am concerned that if we set up a damage scheme, whether it is single damages or injunctive relief, with the very, let us say, vigorous antitrust bar, they are going to be all over these business executives in the information age saying, do not do it, do not do it, you take too many risks. And with legal bills that can stem from the injunctive relief remedy or from single damages, I think we do a great deal to nip this as it tries to get out of the box.

I see as fundamental to our really promoting research and development, this tremendous uncertainty and I see executives, in effect, sitting around conference rooms all over America looking at those reduced damages, whether they are injunctive or whether they are single damages, and a very vigorous antitrust bar saying, you better not get into that area. For that reason, I say that I think the real key is to draw the line. Say, when you go here, there is a presumption that you are behaving in an appropriate manner; when you go on the other side, there is the presumption you are not.

Mr. SENSENBRENNER. I do not have a big hangup on single damages versus triple damages. The problem that I have is that if the Congress passes the shipping bill, which is heavily lobbied, that provides for single damages for violations of the guidelines that are set forth in that act, then we are saying the Shipping Act is more important than R&D and high-technology areas.

That is a value judgment that I do not particularly feel comfortable in defending. That is a decision that I think will probably be made by others, rather than by us.

But the concern that I have is that if A, B, and C get together and talk about a joint venture and they might be in technical violation of the fine print of any legislation we pass, then they could get

nailed with a triple damage suit. You know that lawyers are conservative by nature and antitrust lawyers are probably more conservative from a legal standpoint than anybody else. I think that a lot of productive discussion would simply not take place because of this kind of a fear.

Mr. ZSCHAU. If I may, I would like to make a comment about your proposal. I think it is excellent that you have recognized that not all discussions to form a joint venture are successful, and yet the liability might be there under current legislation. To clarify and make sure that, again, rule of reason applies rather than considering such discussions that per se violation may be another approach to solving the problem.

Let me make just a general comment about this notion of risk. I would not want to have the committee conclude that the people in the high-technology industries, or even the low-technology industries, need to have all risk removed in order to proceed. We come—my background is from the electronics industry. We live with risks all the time. It is reasonable risk that we would be looking for here and that is why the approach that I recommended earlier, I believe should be considered.

To the degree that you specific exactly what the conditions are, you eliminate the risk but you may have a very inflexible system. Not all joint ventures could be accommodated by it.

If you can reduce somewhat the specificity of the conditions, have broader, more general conditions, you may be able to encourage the formation of appropriate joint ventures in more business sectors and not increase the risk to an unreasonable level.

Mr. SENSENBRENNER. Let me ask one brief question. Is there any way we can write into a bill the requirement that the Antitrust Division of the Department of Justice apply the rule of reason? Most people who have dealt with them think that that is the last place in Washington the rule of reason applies.

Mr. SYNAR. You will get no argument out of Ron and me.

Mr. WYDEN. Nobody ever accused the Government of being that logical, Jim.

Mr. SENSENBRENNER. Thank you. I yield back the balance of my time.

Mr. MINETA. Mr. Gregg.

Mr. GREGG. Thank you, Mr. Chairman.

I was wondering if either Ron or Mike could address the issue that was raised by Ed on this question of the fact that you may be too restrictive by going in this approach. You may limit formations of groups which we cannot anticipate their structure, but which, by putting such defined language in place, you do create areas.

Mr. WYDEN. I think Ed has got a very valuable point and one of the things—I think all of us agree—you have got to address both the sunrise and the sunset industries. In fact, one example that we continually cite deals with the automobile industry, clearly one of the large capital-intensive kinds of industries. We felt that if we had had this kind of approach in line, the companies, when they were charged with the obligation of coming up with a catalytic converter, could have come up with it much faster and in a manner that would have saved the American people millions of dollars in getting it online in terms of consumer car prices.

So I think we do want to address both the smokestack and the sunrise industries. This approach that we have got is really just a starting point. We try to set out some conditions. They may need to be modified as we go along and I think Ed's point about the mature industries is a good one.

The one thing, Judd, that we really think is critical is again this point of the clear line. Whether we are talking about just mature industries or mature and sunrise industries or what have you, we still think you need a basic line, and if you say if you do A, B, and C, which gets you over the line, there is a presumption that you are behaving in an appropriate kind of manner.

The other point that I would want to touch on is that Ed's point about risk is a very important one and central to what we are trying to do here. I in no way want to indicate that the sponsors of this legislation are trying to guarantee the high-tech industry a profit. Nobody can guarantee a person a profit; that is part of the risk of the marketplace.

What we are trying to do is reduce what I call the legal risk, which has nothing to do with the initiative and the independence and the creative spirit of business. What we want to do is let that initiative and entrepreneurial risk flourish and at the same time, not subject our high-tech industries to what I call unreasonable legal risk which comes from not artfully drafting what you can do and what you cannot do.

Mr. GREGG. The difference between Congressman Zschau's position and yours is essentially that he does not want to draw a definitive line, as I understand it.

Mr. ZSCHAU. Let me just clarify that I think that we ought to consider another approach, a more flexible approach because of these concerns that I had that the conditions may be too restrictive to encourage the kind of joint ventures that we would like to see from forming. Not knowing what all the possibilites are, I would like to have us consider a more flexible approach.

But I would not want the committee to say that I think this is the right approach or it should be endorsed. But I would like it to be studied or considered because of this disadvantage with the very well-defined set of conditions that I mentioned.

Mr. GREGG. So you are thinking of it as an add-on to the——

Mr. ZSCHAU. Or an alternative way of thinking that perhaps may stimulate, then, some redefinition of the conditions or a way of making the conditions flexible enough to encourage a broader range of ventures.

Mr. GREGG. Could that be possible—would it be possible to have your bill and have grafted on to it the Zschau approach, which would be—you know, if you comply with your specifics, you are clearly not in the antitrust violation. But even if you do not comply with those specifics, you can still possibly avoid antitrust by complying with the Zschau. Is that a possibility?

Mr. ZSCHAU. Sure.

Mr. SYNAR. Hey, we are very educable on this side of the table. [Laughter.]

Mr. MINETA. Would the gentleman yield?

Mr. GREGG. Yes, Mr. Chairman.

Mr. MINETA. In this whole area of R&D, where is this R&D effort being—where is it really being put? Is it as it relates to pure research? Let me put it this way: If we deal with this whole cycle, we have research, development, testing, evaluation, and production.

Where does this R&D cycle fit in? Are we looking at R&D at the initial stage here, in the research? Or are we looking at R&D as it relates to production? I am wondering whether or not this whole point of that Harvard Business article was not that business is, in fact, going to research as it relates to production? But it is not really doing the research at the beginning, in the pure research part, because they are leaving that up to universities and government, and that most companies today, including drug companies, are getting away from that pure research end of it and are really doing more research at the other end.

I am just wondering where, in any of these bills, is there that applicability if that is what we are trying to encourage or promote. Maybe I could ask you——

Mr. ZSCHAU. I would like to respond to that, Norm. I think that the sort of research that would be done in research joint ventures is the very risky and expensive research. If it is research that is the modification of existing technology or the development of new products or design, a company does not want to share that with its competitors; it wants to have distinctive products.

But when there is a great chance that nothing will come out of it or it will take many more years than they originally expected, then the pooling of research effort and sharing that risk and those expenses makes sense. Whether it relates to manufacturing or whether, you know, it is pure research, depends upon the technology. Let me give you an example.

If we were to make a significant breakthrough in densities or speed of intergrated circuits, it will involve not just basic research, but it will also involve manufacturing techniques, quality techniques, computer-automated design techniques, and so forth. What you might call more manufacturing-oriented research.

But it is that whole spectrum of problems that have to be solved in order to advance that technology. If it is in a new area of genetic engineering where you are trying to apply gene-splicing techniques to develop a new substance that has never been developed, then it is more pure research and the manufacturing issue may be less important at that stage.

So I think it depends on the kinds of technologies you are dealing with, whether it involves manufacturing or not, but the generic characteristic is that it is too expensive, it is too long term, it is too risky for a single company to want to do alone, and yet it is so important for us in order to maintain our technological leadership that we have got to allow companies to come together to pursue it and share those risks.

Mr. WYDEN. Could I touch on that just for a second, Norm, because everybody in this field is trying to encourage the pure research, but I think everybody acknowledges, as part of this debate, that the research agenda, the joint venture, is going to be set up by sponsoring corporations whose interest, obviously, is to make a buck. Somebody said these corporations are not going to be looking into why the Sun comes up in the morning or why the Earth goes

round. What they are going to be doing is trying to come up with something that has got a commercial application.

One thing that I do feel strongly about is that in our legislation, the sponsoring companies are allowed to cooperate only in the research part of the stage. I mean, it is going to have commercial application, but we do not let them come together in manufacturing or the marketing of any products or processes that might result.

So, in effect, what we are doing is trying to encourage the base technology, which we regard as close to pure research, and in that way, presumably everybody is going to be able to be part of the competitive process——

Mr. MINETA. Well, what about CAE, computer-aided engineering, or CAD/CAM? Are those exempt or are they—how is that approached in—how should we approach either CAD/CAM or CAE?

Mr. ZSCHAU. Well, to take my example that I was giving, I would include those kinds of developments where you have to make improvements in those technologies, either manufacturing technology or computer-automated design technology as part of a research program. In order to get densities of circuits that are 100 times greater than we have now, we have to make advances in those sorts of technologies.

They are not particularly product-oriented, that is, you are not describing what is on the circuit, but you are saying that if you could design such a circuit, here is how you would make it. Or here is how you would go about designing it. I would consider that to be a tool that could then be generally used by the various companies and would fall under this basic type of research program.

Mr. GREGG. Thank you.

Mr. MINETA. I thank the gentleman.

Mr. MacKay.

Mr. MACKAY. Representative Zschau, I know you to have been working in this area a good bit. Are you familiar with the position of the Reagan administration or does your effort reflect their position, or is there any coordination in that?

Mr. ZSCHAU. Well, I think that the representatives from Justice and Commerce have testified in the other body on this issue. The approach that they were recommending was not exactly my approach, but it was a more flexible approach. I have not read their testimony, but I understood they were talking about reducing the damages from treble damages to single damages and not requiring a certain set of conditions to be met.

So I think that what I am proposing, or was proposing to be considered today was along the lines of what I understand they were recommending.

Mr. MACKAY. In effect, it is a trade off and you are essentially saying to reduce the damage side of the equation, put more flexibility in there, and then if there is some chance, at least it is a reasonable risk and people will be motivated to go ahead.

Mr. ZSCHAU. Yes. Essentially my approach is eliminate the unreasonable risk, the risk that you would be sued just because you formed a venture even though it was not anticompetitive, or the risk that you would be sued unjustifiably because of the lure of treble damages and that if you could reduce the risk by those kinds of changes, that would be a more tolerable risk, an appropriate

business risk that companies may be willing to take, rather than putting them into the straitjacket of certain conditions that they may not be able to satisfy.

Mr. MACKAY. Thank you, Mr. Chairman.

Mr. MINETA. Any further questions?

[No response.]

Mr. MINETA. Well, let me thank you, Mr. Wyden, and you, Mr. Zschau, and of course, Mr. Synar, for your efforts in this whole field. I am quite sure that given the Sensenbrenner bill, your bill and the limited H.R. 108, that out of this whole effort will come some productive legislation to help us keep that technological edge that we so desperately need.

So, again, thank you very, very much.

Mr. ZSCHAU. Thank you.

Mr. SYNAR. Thank you.

Mr. WYDEN. Thank you.

Mr. MINETA. I would like to now call on panel No. 2, Peter F. McCloskey, president of the Electronics Industry Association; and Ronald E. Myrick, vice president, Mostek Corp./UTC, on behalf of the Semiconductor Industry Association.

We are pleased to have the real Pete McCloskey before us today. Pete, go ahead.

STATEMENT OF PETER F. McCLOSKEY, PRESIDENT, ELECTRONIC INDUSTRIES ASSOCIATION

Mr. MCCLOSKEY. Thank you, Norm.

Mr. Chairman and members of the committee, I am gratified that there is another McCloskey in Congress; that we should not be unrepresented. I understand he is from Indiana, the new Member.

I am excited about what I heard today. I think the level of discussion amongst the members who are on your panel here and the discussion from you of the committee shows a deep understanding of the basic issues that confront us in this very tough area of research and development and international competitiveness.

We more and more recognize that all U.S. companies in the electronic industry are in the international marketplace whether they export a single product or not. The United States has the most, bar none, open marketplace in the world. Increasingly, every company in the domestic market is faced with international competition in our domestic market.

That international competition has certain advantages in some cases. One of the advantages that they have in Japan is what I would say an enlightened view toward the importance of joint research and development. When I talk to Members of the Antitrust Bar and to other Members of Congress, it seems that there is a general feeling that really there is nothing in our antitrust laws today that bar the creation of joint research ventures.

Yet, when I talk to members of industry who ought to initiate those ventures, I have a very different feeling. It may be that it is just the perception of those antitrust laws that are inhibiting them. I was present at that initial meeting of MCC and I know that was a matter of great concern to those chief executive officers who attended.

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I know that they did not take lightly the letter that they received from Mr. Alioto which goes to one of the points of that Mr. Sensenbrenner made. He raised the issue in his letter, how do you even get together to discuss joint research? He went on further to say that even if the Justice Department were to grant a business review letter approving your joint venture, that does not bind the private Attorney General. He is going to be able to bring an antitrust suit and he put them on notice that he most likely will.

Now, I think we have got the range and the spectrum of opinion on this subject pretty clear. I think what is needed is a clear understanding on the part of the businessmen involved, that if they enter into a joint research venture, and if they do it openly, above board, and do what they say they will do, that sometime down the road, revisionist thinking will not say, what you did was wrong, and we are going to slap you with treble damages because of it.

That is the kind of problem that we do, in fact, have today, and it is why I think we have not seen much, if anything, in the way of joint research ventures. As far as I am aware, the only really truly created joint research venture is the MCC and it is not really off the ground and running yet, but hopefully it will be a success.

I want to point to some of the other reasons why I think that joint ventures are important to us as a society. I think it was well stated by many people, but I think Mr. Mineta, Mr. Zschau, perhaps know it best of all.

Representing a district that grew from the research effort of Stanford University and that grouping, that mass of effort in one place, which radiated out, which spun off so many entrepreneurs who were willing to take their chances to develop products and create new markets for new products. That is the nature of our innovation process in the United States. That is the reality of it.

You get companies and you get people that are doing a lot in the way of research and development and you find out that if they are not funded for the next phase of that research effort, and something that they truly believe in, they are going to go outside, find venture capital and create new enterprises.

What we are talking about is in no way a change. What we are talking about is a stimulation to a process that exists, which we feel is legal today, and which is important to the success of our industry tomorrow.

I would subscribe to the comments by Mr. Zschau as well. I do not want to sit here and say that joint research and development is the sole prerogative of the high-technology companies. I think all of our industry is going to benefit as a result of joint research, properly used and properly applied.

I think very strongly that the products of the high-technology industry are going to benefit all of those diverse sectors of our economy. That is the strength of our high-technology industry.

What we have to do is foster that strength of our high-technology industries so that they can help in revitalizing all sectors of our economy.

The issue, then, to me, is clarity and simplification as it relates to interpretation of the antitrust laws and joint research ventures. I can go into the background of the various bills. Mr. Mineta was

instrumental in introducing the earliest bill on joint research in the House.

The intent of that bill was very, very simple. It was to say that that which was thought to be legal is legal and is not subject to challenge later on because of some revisionist-type thinking.

The reason that that did not get administration support was that it put a heavy workload on the Justice Department and the Justice Department was concerned that they were going to be turned into something like a regulatory agency. So then it made sense to say, well, let's see if we can design a bill in the House that will set standards and relieve the Justice Department of much of that regulatory burden.

I would subscribe, Mr. Gregg, to the comments that you made, that the spectrum is there. I think that we can have a bill that provides standards and in those tough cases where the standards will not apply, that provides a mechanism to go to the Justice Department to provide the assurance and the capability in those hard cases where in-depth analysis can be done.

I do not see that that is in any conflict. I think the goal is clear. I think the commitment on a bipartisan level is clear. I think the importance to our society is clear and I think we will be failures if we cannot work that out amongst ourselves.

Thank you very much.

[The biographical sketch and the prepared statement of Mr. McCloskey follow:]

NEWS RELEASE

electronic industries association

PETER F. McCLOSKEY
PRESIDENT
ELECTRONIC INDUSTRIES ASSOCIATION

Peter F. McCloskey was appointed president of EIA in October of 1977. As the Association's chief executive officer, he oversees the activities of the national trade organization representing the full spectrum of U.S. manufacturers in the $114 billion electronics industry. Headquartered in Washington, D.C., the Association represents manufacturers whose products range from the smallest electronic components to the most complex systems used by defense, space and industry, including the full range of consumer products. EIA is a major force in advancing electronic technology and productivity in this country and in the world marketplace.

Mr. McCloskey currently serves on the Peace Corps Advisory Council under an appointment by President Reagan.

Prior to joining EIA, Mr. McCloskey served as president of the Computer and Business Equipment Manufacturers Association; and as president and chairman of the board of Farrington Manufacturing Company. His professional experience also includes various management positions with IBM, a private law practice and service as a first lieutenant in the United States Marine Corps.

Mr. McCloskey received his bachelors in physics in 1956 from Holy Cross College and his law degree from Fordham University School of Law in 1965. He is a member of the New York State, Virginia and District of Columbia bars.

A native of New York City, Mr. McCloskey now resides in McLean, Virginia with his wife, the former Louise Collins, and their four daughters.

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Electronic Industries Association

Statement of
PETER F. McCLOSKEY, PRESIDENT
Electronic Industries Association
(EIA)

to the
Subcommittee on Science, Research & Technology
on
JOINT INDUSTRY RESEARCH AND DEVELOPMENT

July 12, 1983

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Mr. Chairman and members of the Committee, my name is Peter F. McCloskey. I am the President of the Electronic Industries Association (EIA). I certainly appreciate the opportunity to be here today, and wish to commend you for focusing on this vitally important issue. Legislation which would stimulate joint ventures through clarification of the antitrust laws has been an EIA priority for the last several years. This hearing today will assist greatly in creating a clear understanding of the issues involved, and especially in charting the course for an effective legislative solution to industry's concerns.

With more than 1000 participating companies, EIA is the full-service national trade organization representing the entire spectrum of U.S. companies manufacturing electronic products. These include components, equipment, and systems made for industrial, governmental, and consumer end-uses. In 1982, the electronic industries of the United States generated $126 billion worth of factory sales, exported over $24 billion. We are one of the few manufacturing sectors of the U.S. economy that produced a trade SURPLUS (3.2 billion). These figures are an indication that our industries are advancing and that our products are competitive.

The members of our Association, both large and small, are making an increasingly large contribution to the American economy, both through growing profits and the creation of badly needed jobs. The electronic industries employed 1.6 million Americans in 1982; up from last year despite the bad recession.

The thing that really brings us all here today is the recognition that the global marketplace, in which the United

States finds itself, has created new challenges and has changed the way we think about our position as a world competitor. Our achievements as a nation have been remarkable in so many fields. The challenge, then, is to maintain our preeminence. It would not be appropriate, indeed not advisable, for the United States to blindly adopt the models of its foreign competitors. What we must do, however, is assure that we eliminate any existing barriers to American industry's ability to be productive and innovative.

There is no question that the existing uncertainty as to the scope of the antitrust laws as they relate to joint ventures constitutes one such barrier. Legislation to remove that barrier is in no way intended to change the major thrust of existing antitrust law. It simply would be a creative fine-tuning of these laws to foster an environment conducive to achieving what must be an important national policy goal -- increased innovation through joint research.

Why Stimulate Joint Ventures

Why should we seek to stimulate joint research and development ventures? Clearly because no other sector of our economy is viewed with such high expectation as is research and development--and not without foundation. Research and development has truly been the horn-of-plenty--the cornucopia--that has driven our mighty economic engine since World War II. At this time of increasing international competition it is important that we develop a national commitment to revitalize the nation's economy, to enhance our international competitiveness,

and to spur industrial innovation and increased productivity.

The success of the high technology industries depends on their ability to stay ahead of foreign competitors in producing products using state-of-the-art technology. Often, those foreign competitors are free to mass their resources against American firms. Increasingly, people contrast United States R&D policies with Japan where its Ministry for International Trade and Industry actually promotes mergers and cooperative arrangements to revive flagging industries or to develop new products. R&D in Japan is becoming more and more rationalized, or to be more accurate, targeted. Under Public Law 84, the Japanese Government has manifested its role in rationalizing industry, discouraging noncompetitive companies, cartelizing the remainder, organizing joint research ventures, sharing the technology amongst the various participants, using administrative guidance to discourage foreign competition, providing funds for the research, and doing a host of other things to support, nurture and develop Japanese industries. With that array of weapons in their industrial arsenal, the Japanese are truly formidable competitors. We have a completely different culture and historical background. What is the proper role of our government? That dialogue is beginning to take center stage on the American scene. What surely can be said is that at the very least the government should create the environment where the competitive forces of our market driven economy can operate effectively to leverage its strengths and minimize its weaknesses.

There are many other practical justifications for promoting joint ventures. First of all, many companies simply are not able

to perform desired levels of R&D because of a lack of financial resources--R&D is very capital intensive. The cost of innovation in computer technology, for example, is growing exponentially. Secondly, many companies lack the necessary human resources--there is a serious shortage of adequately trained scientific and engineering manpower.

Why Legislation

American genius and technical innovation will flourish if given meaningful incentives and freedom from inhibiting restraints. I believe that antitrust law has hamstrung innovation, especially in the field of joint R&D. Our rugged individualism--induced by our frontier background--combined with uncertainty over the application of the antitrust laws, has inhibited the use of joint research as a weapon in the industrial arsenal of the U.S. This is unfortunate because when properly applied joint R&D can be extremely effective.

Clarifying legislation would eliminate current legal uncertainty surrounding joint R&D ventures, stimulating increased R&D from the private sector. Over time, this would accomplish the creation of a framework for longterm basic industrial research activity. As you well know, too much of the industrial research performed focuses only on shorter-term applied research driven by industry's need for immediate return on investment. By pooling resources, companies can afford longer-term research--the fruits of which will be employed to assure our industrial competitiveness worldwide. Certainly, one would also expect as a longterm benefit of this legislation a real increase in the

productivity growth rate, a lowering of the inflation and unemployment rates, and a stimulated economy.

Some argue that current antitrust laws are not a deterrent to joint R&D ventures. I suggest that no matter how remote, the risk of suit by private third parties still exists. To those who have said that our antitrust laws are flexible enough already, and that our review procedure in Justice is adequate, let me quote Mayor Alioto in his letter to the heads of companies participating in the MCC: "The reported 'clearance' letter from the Antitrust Division of the Department of Justice is not remarkable. Even a student of the antitrust laws knows ... that a clearance letter from the (present) Antitrust Division is not an authorized grant of immunity from private antitrust enforcement. Neither the Courts, the law nor private parties are the least bit bound by Mr. Baxter's philosophy of what the antitrust laws should say or how they should be interpreted."

Review of Legislation

Various legislative solutions to this antitrust uncertainty have been proffered. No one would question that each proposal embodies an identical conceptual goal--that of course being to stimulate joint R&D ventures by clarifying the application and interpretation of the antitrust laws. Only the specific approach to accomplishing this goal has differed in the various proposals.

I would like very briefly to review the progress of this legislation for the record, and for sake of you present today. In 1981 EIA sought to have introduced in Congress a legislative approach to this issue which we presumed would have the desired effect. Under that proposal which was later introduced in the

House by Congressman Don Edwards and in the Senate by Senators Glenn and Kennedy, firms interested in forming a joint venture would utilize the existing business review procedure in the Department of Justice. If the Attorney General determined that the venture was not likely to violate the antitrust laws, then he would issue a certificate of immunity. The venture would be immune from criminal and civil suits until the Attorney General lifted the immunity. The key ingredient in this legislation is that it provides certainty to the coventurers by removing retroactive damages for actions consistent with the approved R&D plan submitted by the joint venture.

The Department of Justice opposed this legislation on grounds that it placed them in an inappropriate regulatory mode which would fundamentally alter the Department's role as a law enforcement agency. Consequently, Senator Mathias and later, Congressman Synar, introduced legislation which would establish a self-certification process based on a series of specific objective standards. This process would provide interested firms the capability of definitely determining whether or not their proposed venture would be lawful. Having met those guidelines, the venture would be accorded criminal and treble-damage immunity. The benefits of this approach from industry's perspective is that legislated guidelines would answer Justice's opposition to prior review and granting certificates. In addition, legislated guidelines would provide the certainty, as to the venture's lawfulness, which would effectively reduce suits by the private antitrust bar.

Additionally, Senator Tsongas introduced similar legislation which you have also heard about this morning. His bill combines the prior review by the Attorney General with legislated guidelines which are broader than those in the Mathias and Synar bills. Most recently, Congressman Sensenbrenner introduced similar legislation.

At this point, it is important to note that a portion of the recent proposal by the Reagan Administration regarding antitrust reform bears directly on this subject. This package is further evidence of the broad bipartisan support which exists for stimulating joint ventures. The proposal reflects the kind of thinking which I spoke of earlier about how we view our position as a world competitor. One important caution, however, should be made. Inasmuch as the Administration's package addresses far more than R&D, and entails major changes in antitrust laws, I would encourage members of Congress to consider the legislation being addressed today as one small R&D piece which is too important to become captive to the larger debate which logically will follow the Administration's proposals for sweeping antitrust reforms.

The task before us is a difficult one. To cull from the various approaches a legislative solution which will satisfy the goal of stimulating industry joint ventures, satisfy industry's need for certainty, and most important satisfy the challenges before the U.S. to compete internationally will require a great deal of work.

Allow me to propose, on behalf of the EIA membership, what we would like to see evolve as a legislative solution. We would

favor legislation that would embody the goals and principles as they have been described, and which would, whether by self-certification or a blessing from a government agency, create what I call a new "zone of certainty" within which private industry can make important decisions about its research activities with immunity from future antitrust attack by either DOJ or private antitrust litigants. Certainly there will be cases in which it is not crystal clear to the firms contemplating a venture their standing vis a vis this new zone. In these limited cases we would propose there be a mechanism to create a "zone of safety"; in which the Department of Justice or some other agency could assist in making a final determination through some approval procedure.

Despite our vast resources and knowledge, there persists a sense of apprehension in the air as we face the challenges of international competition in the final years of this century. This apprehension comes from a fuller realization that we no longer have a corner on the market of brains and technological innovation. It is time to turn our vast resources and knowledge into real advantages--indeed, to leverage them as best we can to ensure our role as the world leader in technology. R&D will continue to drive our engine of progress. We must pursue it as aggressively as ever if we are not to lose our position as a world leader.

Mr. Chairman, my testimony has been purposefully broad and supportive of the basic conceptual approach to stimulating joint ventures. I would be pleased to answer any specific questions regarding provisions of the various bills.

Mr. WALGREN [presiding]. Thank you very much, Mr. McCloskey.

Mr. Myrick.

Mr. MCCLOSKEY. Excuse me, may I ask that my actual testimony be submitted for the record?

Mr. WALGREN. Yes, and let me say at the outset to all of the witnesses that your written statements will be made part of the record and you should feel free to outline or communicate in whatever way you feel most effective in making the points you want to make.

Mr. Myrick.

STATEMENT OF RONALD E. MYRICK, VICE PRESIDENT, MOSTEK CORP./UNITED TECHNOLOGIES (SEMICONDUCTOR INDUSTRY ASSOCIATION), ACCOMPANIED BY R. MICHAEL GADBAW, LEGISLATIVE COUNSEL, VERNER, LIIPFERT, BERNHARD & McPHERSON

Mr. MYRICK. Thank you, Mr. Chairman. At this time, I would like to express my appreciation for hearing me today as a representative of the Semiconductor Industry Association.

We in the semiconductor business feel that our lifeblood is technology. It is research and development, so the subject that we are discussing today is singularly important to us.

I do appreciate that you will put my remarks that I have already supplied to the committee into the record and I will depart from those remarks now and summarize, paraphrase, and supplement those remarks based somewhat also upon what we heard this morning from the three preceding Congressmen and from Mr. McCloskey.

To us, the key element that is required is the element that you have heard so many times this morning, and that is clarity. There is also an element of promotion. When one speaks about the Japanese system, we are hearing of a $450 million investment for the fifth generation computer. We are hearing real promotion, not the establishment of disincentives and obstacles.

When we began the process within our association, and more broadly involving a number of other trade associations, the process of trying to come to a consensus on what it is we could support in the various bills that have been introduced in both the House and the Senate, and now the new proposal being made by the administration, we began that process looking at initially the Edwards bill, then 1952, much more recently the Sensenbrenner bill and the standards which appear in the latter two.

Our initial interest in those standards was that they be very clear. We felt quite confident that those were clear enough standards to support a determination by management of a corporation in deciding whether or not it should go into a joint venture, that if those standards are met, they are objective enough to be able to be certain they have been met.

But at the same time, we considered there is a likelihood, or least a possibility, that the concerns that Mr. Zschau expressed this morning might come forward somewhere in the discussion of these bills in the Congress. We have decided that it would be important

for us to have a mechanism behind the bill that would be insensitive to the standards that are chosen.

By that, I mean that if one chooses very narrow standards, very specific and objective standards such as are present in the Sensenbrenner bill and the 1952 bill, one is without as much difficulty in understanding what is going on, but then, at the same time, one is perhaps subjected to the likelihood that there will be an ultimate determination sometime in the future that those standards were not met; probably not, but possibly.

I think the key thing that we were looking at was if the standards are objective, they can be determined to be decided upon in the early days of the formation of the joint venture, but if they are not objective, they cannot be definitely decided upon as having been met.

So in the end, we decided that it would be a desirable thing, if we were to forward a program that would be insensitive to the standards, we would be better off with regard to the future determinations that might be made. In order to describe the process that we ultimately came out with, I would like to put up for you a chart that we have prepared.

[See the last page of Mr. Myrick's prepared statement.]

Mr. MYRICK. What we have done is we have indicated here that joint R&D should be defined as detrebelized. That is, it should be something approaching the proposal that has been made by the administration, however not perhaps going—at this time, we are not speaking to the issue of going fully to the whole issue of detrebelizing all nonviolations, per se.

But certainly as to joint R&D, there would be a detrebelization, much as as been discussed this morning by Mr. Zschau. Thereafter, one would move into the area of what does it mean if you are detrebelized? Well, there would certainly be no treble damages. The issue that has been raised of interest charges could possibly be addressed, even from the point of filing of the complaint, and there would also be the correlative and fair issue of attorney's fees to the prevailing party, whether he be a plaintiff or a defendant.

But then the issue of these standards, these insensitive standards I was talking about. Suppose the standards are broad; suppose they are narrow. Whatever comes out of the final determination, and I would say that we would welcome the opportunity to work with the staff on that determination.

But if those standards are broad; if that circle that we referred to in there in which the standards that give immunity is a very large circle, and the remainder of that larger circle that is labled rule of reason is small, then there is the natural—the result from that would be that the participants in the joint venture would be immunized as to those standards, as to those events, those activities which are clearly within the standards.

But at the point that you reach the boundary, that is the issue. At the point where you reach the boundary, there will be, by definition, a penumbra, a area of uncertainty. That uncertainty is the thing that deters businessmen from taking what has been referred to by Congressman Zschau as unreasonable risks.

What we have then provided for is that there would be an alternative approach, the desensitizing approach. That is, if the busi-

nessman cannot be sure that they have met these standards, be they broad or be they narrow, they would be able to go, somewhat akin to the approach that the administration has recently proposed, to the Justice Department and disclose fully their activities and look for an immunity arising out of that disclosure, leaving the Justice Department to make those determinations it needs to make in light of the standards, but also in light of the rule of reason.

Whether or not one can legislate that the Justice Department is going to apply the rule of reason is another issue, but I am not getting into that issue at this point.

So our objective, then, is to say that if the individuals who are in the joint venture have a concern that they cannot be certain that their joint venture is going to be immune, they have access to another route, not just the inflexible standards that are specified by law, or by statute, rather, in the cold light of these discussions today and the future days that come in these congressional deliberations.

By this approach, we feel that industry will be given sufficient flexibility to form joint ventures that are presently not contemplated today that may not be on a structure, or based upon a structure that is presently embodied in 1952 or in 3393.

They will be able to be creative. It will not necessarily be tied to just the electronics business; it may be flexible to get into other areas, assuming they need R&D, and I think that is important for all industries today, some more than others.

At this point, I would say that that basically creates the structure that we believe would be conducive to performing R&D joint ventures and creating them. There is one point, though, that was mentioned earlier this morning that I think I have to address. I would like to turn to it.

That is, the role of standards is not, in our view, to determine what is illegal or what is legal. It is to determine what is not subject to liability, that is true, but the fact that one does not meet those standards does not make the joint venture illegal. It should not make the joint venture illegal, particularly when you look at some of the standards that are there.

Some of them are quite minor things, and the mere fact that one did not meet those standards should not make the joint venture illegal; it should merely drop out to a rule-of-reason test at that time. One has not met the standards by which he is defined to be legal, but the mere fact that he did not meet those standards does not make him illegal. I think that is a critical point where I would address Congressman Wyden's comment this morning.

At that point, gentlemen, that is all I have for you.

[The biographical sketch and the prepared statement of Mr. Myrick follow:]

BIOGRAPHICAL SKETCH

Ronald E. Myrick is Vice President, General Counsel and Secretary of Mostek Corporation. He is also Secretary of the Semiconductor Industry Association and Chairman of its Law Committee. Prior to joining Mostek, approximately four years ago, Mr. Myrick was a partner in the Chicago firm of Neuman, Williams, Anderson and Olson. He has published articles in the fields of licensing and international litigation. He was graduated from the Law School of Loyola University of Chicago, Cum Laude. He also has a Masters of Electrical Engineering from Arizona State University and a Bachelor of Electrical Engineering from the University of Louisville.

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Statement of
Ronald Myrick
Mostek Corporation
Semiconductor Industry Association

July 12, 1983

Summary

- The semiconductor industry is totally dependent upon the continuing development of new technologies to maintain its international competitiveness.

- Our foreign competitors in Japan have demonstrated how vulnerable the U.S. semiconductor industry is to the concerted efforts of a government led targeting effort.

- An appropriate American response to this challenge should include the promotion of cooperative research and development through the clarification of U.S. antitrust laws to provide greater certainty with respect to the application of that law to joint research and development ventures.

- A great deal of time and attention has been devoted to this issue in the high technology industries, the Congress and the Administration and out of this debate is emerging a broad consensus on both the need for legislation and the principles that should be contained therein.

The Semiconductor Industry Association would favor legislation which would:

- recognize that certain activity, defined as joint research and development, is fundamentally procompetitive and should, therefore, be encouraged--not discouraged--by the antitrust laws;

- provide with respect to joint research and development activity that is not otherwise immune, that only actual--not treble--damages may be granted to any successful plaintiff, together with interest computed as of the date of filing and attorney's fees to the prevailing party (plaintiff or defendant);

- articulate standards in the statute which would assure non-liability under the antitrust laws for a participant joint research and development venture that met such standards; and

- establish a mechanism which joint venture participants could use, at their option, to obtain "immunity" by disclosing their activities to the Justice Department or the Federal Trade Commission.

Statement of
Ronald Myrick
Mostek Corporation
on behalf of the
Semiconductor Industry Association
Before the Subcommittee on
Science, Research and Technology
of the Committee on Science and Technology
U.S. House of Representatives

July 12, 1983

I have been invited to address you on behalf of the Semiconductor Industry Association. SIA is the industry-wide group comprised of nearly all American manufacturers of integrated circuits and allied microelectronics products. The member firms of SIA are virtually unanimous in their support for legislation which would promote cooperative research and development through the clarification of our current antitrust laws as they relate to such activities.

In my testimony today, I would first like to address the need for legislation to promote joint research and development. I would then like to consider the principles which should be reflected in any legislation, with special reference to the Administration's proposal and the bills pending before this Committee, H.R. 1952 (introduced by Congressman Synar) and H.R. 3393 (introduced by Congressman Sensenbrenner).

The semiconductor industry is typical of other U.S. high technology industries in its total dependence upon the development of new technology to remain internationally competitive.

As has been pointed out so clearly in several bills which have been introduced in both the House and Senate and in

testimony which has been presented to this very subcommittee, the antitrust laws now in existence effectively place American high technology companies at a distinct disadvantage in the highly competitive worldwide marketplace for our products.

Foreign high technology companies -- most notably those of Japan but those of other countries as well -- have been able to capitalize very successfully in recent years on the creative advantages of joint research and development activities -- some of them sponsored directly by their government -- and all of which have been conducted unencumbered by the type of antitrust law concerns which must now prevail among U.S. companies.

The threat to American technological leadership from foreign targeting practices is further compounded by the escalating costs of research in advanced microelectronics. The United States can no longer afford the duplication of effort and waste of resources that result when many companies attempt individually to advance the frontiers of research in this vital area. In 1982, U.S. semiconductor companies spent an impressive 14% of their sales revenues on capital investments and 9.8% on research and development, compared to 7% and 3% for U.S. industry as a whole. Yet, we are still being outspent by our foreign competition in Japan where semiconductor companies, supported by government subsidies and other incentives, are spending as much as 20% on capital and 15% on research and development. In short, maintaining U.S. technological leadership requires that we remove any unnecessary obstacles to cooperative research ventures and actively seek to promote such activity.

This subcommittee has already held several days of hearings on the question of joint research and development and America's competitive response to Japanese targeting practices. At those hearings, Mr. Erich Bloch, the Chairman of the Semiconductor Research Cooperative, described some of the activities that SIA member companies are undertaking to meet this challenge. I believe that testimony provides essential background on the need for changes in U.S. antitrust laws.

Under current antitrust law, the criteria for evaluating joint research and development are unclear. Consequently, American business cannot anticipate whether our joint R&D ventures -- which are undeniably essential to our remaining competitive with foreign companies -- will leave us open to expensive litigation. The present statutes also encourage frivolous actions. These are the unfounded fishing expeditions under the aegis of existing antitrust laws which are the direct result of the economic incentive of treble damages. The point is that any antitrust action -- even the most frivolous -- requires a substantial commitment in management time and company resources to defend, because the stakes are too high to take any chances. This risk of exposure to complex and expensive litigation creates a significant additional risk for joint research and development.

The principal fact that U.S. law should recognize is that properly defined joint research and development is fundamentally procompetitive. Basic knowledge is an asset that can be applied by many individual companies in unique ways to create new products, enhance existing ones and ultimately determine the

international competitiveness of a company's product line.

Legislation to clarify the antitrust laws with respect to joint research and development should, therefore, start with the proposition that an area of activity -- to be defined as joint research and development -- should be encouraged. The antitrust laws can achieve this by recognizing that joint research and development should not be deterred by the threat of treble damage liability and by providing a high degree of certainty with respect to those activities and circumstances in which the participants would not be subject to any antitrust liability.

In reviewing the legislative proposals that have been introduced to date, there is a consensus on the need to encourage joint research and development and on the ways to achieve this objective.

Three different, but complementary approaches, have been proposed which could easily be woven together in a single bill.

The first approach would focus on the remedy available to complaining parties in antitrust actions. This approach would explicitly recognize in law that joint research and development activities, as defined, are not per se illegal and should not, therefore, be subject to treble damage actions.*/ Thus, any liability under the antitrust laws for such activities would be

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*/ Assistant Attorney General William Baxter has proposed that treble damage liability be eliminated for all "rule of reason" offenses, and would subject all joint research and development activities to a reasonableness test. Congressman Sensenbrenner's proposal (H.R. 3393) would eliminate treble damage liability for research and development activities that are not otherwise immune.

limited to actual damages.

In the Administration's proposal, this change in antitrust remedies would go beyond joint research and development and would apply generally to any area of activity that is subject to the rule of reason test under the antitrust laws. As such, the proposal goes beyond the issues that are being addressed in legislation before this Committee. For that reason, it may be preferable to address activities other than joint research and development in separate legislation.

Corollary changes in the remedies available would allow interest charges from the date the suit was filed. This proposal should be coupled with the principle that the prevailing party (plaintiff or defendant) should be allowed to collect attorney's fees as is provided in H.R. 1952 and H.R. 3393.

A second approach would establish a set of standards in the law which would qualify a joint research and development venture for antitrust "immunity" from both civil and criminal actions.**/ Thus, participating firms would be in a position to determine for themselves when their activities would be free from antitrust liability. Establishing sufficiently objective standards by law would increase the possibility of eliminating both the vagaries of current law and the changes in interpretation and enforcement that frequently accompany changes in administrations.

The key to establishing appropriate standards is to ensure

**/ See section 4 of H.R. 1952 and section 3 of H.R. 3393 which provide illustrative lists of standards.

that they would be used to determine when a joint research venture is automatically "immune" (not liable under the antitrust laws), without establishing that ventures which did not meet the standards are therefore illegal. While this point is implied in H.R. 1592 and H.R. 3393, it would be desirable to state this explicitly in the legislation, lest there by any misunderstanding of the meaning of such standards.

A third approach involves the creation of a mechanism for obtaining antitrust immunity based upon disclosure***/ and in some cases affirmative review, by the appropriate Federal agencies. The preferable version of this approach would be one in which the venture qualifies for the exemption, unless some affirmative action is taken by the responsible Federal agency to deny it.

SIA believes that the principles underlying these three approaches can be melded into a single comprehensive statute which would make a substantial contribution to the clarification of the antitrust laws to this important area. The statute should:

- Provide that the competitive effects of joint research and development be judged under the rule of reason test and any financial remedies available under the law should be tied

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***/ Immunity based upon disclosure has been proposed by Assistant Attorney General Baxter. Similarly, H.R. 1952 and H.R. 3393 would provide immunity for ventures which meet certain standards and which are disclosed to the Justice Department.

to actual, not treble, damages, together with interest computed as of the date of filing and attorney's fees to the prevailing party (plaintiff or defendant).

- Articulate standards in the statute which would assure non-liability under the antitrust laws for a participant in a joint research venture that met such standards. These standards would not, however, define the line between legality and illegality, but rather would define the parameters of a "safe harbor".

- Establish a mechanism, such as in the proposed Justice Department Bill, which joint venture participants could use, at their option, to obtain "immunity" by disclosing their activities to the Justice Department or the Federal Trade Commission.

Virtually every legislative proposal that has been introduced to date has some variation on these basic principles. Given the broad consensus around these concepts, SIA supports moving as expeditiously as possible to work out the details of implementation.

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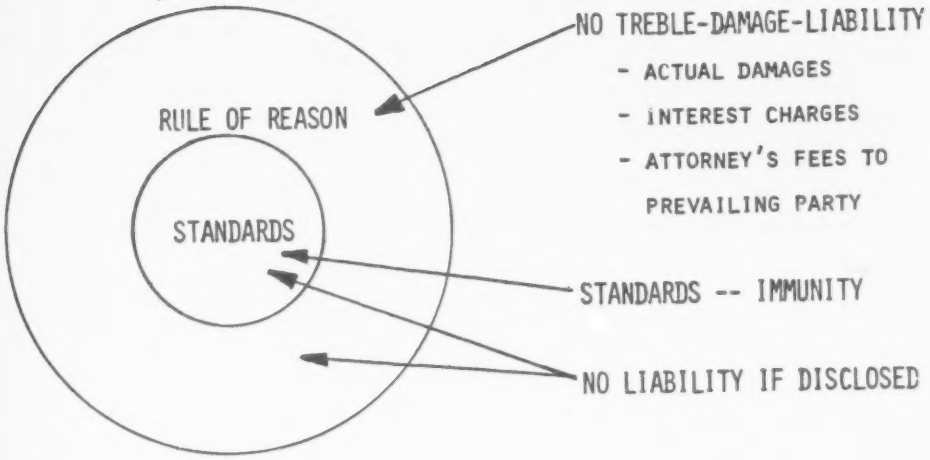
JOINT RESEARCH & DEVELOPMENT



Mr. WALGREN. Thank you, Mr. Myrick.

Let me recognize Mr. Gregg for a conversation or comments.

Mr. GREGG. Thank you, Mr. Myrick and Mr. McCloskey.

I appreciate your proposal here, Mr. Myrick, it seems to flow naturally. I am also concerned, as I think of the question that Mr. Zschau pointed out, why cannot we have our cake and eat it too in this situation? Why can we not have the standards that exempt somebody, and then if they do not make those standards, why can they not fall into a second category where they at least get a shot at making it.

Do you have this in a draft form outside of your statement?

Mr. MYRICK. We have available—I have with me Mike Gadbaw of our Washington counsel's firm and he can provide those to you.

Mr. GREGG. OK, I would like to get it if possible.

Mr. MYRICK. Oh, you mean in draft legislation form?

Mr. GREGG. Yes, how you would integrate this into either the legislation that has been proposed or as a separate piece of legislation.

Mr. MYRICK. We can provide—we can work certainly with your committee staff to prepare that. We have not yet done it.

Mr. GREGG. I would like to get a draft along those lines so that we could put it all on the table together and print it all out, and then shuffle the papers together so we can come up with something.

Mr. MYRICK. We will be happy to do that.

[The information appears in appendix II.]

Mr. GREGG. OK, thank you.

Thank you, Mr. Chairman.

Mr. WALGREN. That is the way things happen around here, you know. You put it all on the table and shuffle the papers. It becomes one of those things that must be compromised away and incorporated.

Mr. Mineta.

Mr. MINETA. Thank you, Mr. Chairman.

I am just wondering, not having really looked at 1952 or 3393 that extensively, but is there a determination by the Attorney General's Office that gives clearance, then, to the application, either under 1952 or 3393?

I am wondering to what extent does that still leave that uncertainty there versus having some kind of Good Housekeeping Seal of Approval from the Antitrust Division of the Attorney General's Office?

Mr. MYRICK. Congressman Mineta, I welcome your question because when I shook my head in regard to 3393, I was not totally accurate. There is one provision in 3393 that provides that a particular feature that is important in that bill, it is article 3(b)(1), which is the percentage, market share requirement in that bill, can get a determination. You can seek a determination of that particular feature from the Attorney General, but I do not believe there is any other affirmative certificate in the Sensenbrenner bill other than that.

I would say this: Again, going back to the desensitizing mechanism that I described earlier, when we were trying to find out what standards would work or what process would work, whether the standards were broad or narrow. Before the administration came out with its proposal for immunity based on mere disclosure, we were going with the negative clearance approach. That is, that we would go to the Justice Department with a full disclosure with an obligation upon the Justice Department to take affirmative action to stop the venture, or the formation and ultimately the operation of the venture, but the formation of the venture within a prescribed time, and giving the Justice Department a period of time to seek additional information and so forth. But at some point, an affirmative cutoff, and if the Justice Department had not acted by that time, it would be, by definition, exemption, immunity, whatever.

We did that based upon the fact that in the original responses, as we understood it, of Justice to the proposals of your bill, there had been some comment that they did not want to have the workload of giving affirmative certificates. We had also some information that they would prefer a negative-clearance approach rather than an affirmative-clearance approach.

As for us, it mattered little because the end result was we would get the same. We were quite pleased with either approach.

But now the administration has come out with this new proposal in which mere disclosure alone creates an immunity, an exemption—that is the word I am looking for—and the fact that that exemption is present by arriving at from just disclosures is quite adequate for us.

The administration goes a good deal farther and on this point I am not at liberty to discuss because I have not had time to poll our companies and get a consensus, but the administration goes a good deal further and even deprives the public of—we deprive the public of the right to be—even attorney generals for private attorney generals for an injunction. That is a step quite a long way down the path.

But what we certainly can say is that if the administration is willing to take on a disclosure basis for the exemption, that would be satisfactory to us.

Mr. MINETA. When we deal with market share, should that relate to an expected product, or should it rather be related to the expected product resulting from the research venture?

Mr. MCCLOSKEY. I think it should be——

Mr. MINETA. Should we look at that in view of the present world or of what we expect to be coming out of the R&D efforts?

Mr. MYRICK. In my judgment, you have to look at it from the present world, rather than what you expect to come out of it. Because if they are doing their job, they ought to have 100 percent of the market share of what is coming out of it for some period of time, whether it be 6 months or whatever, because they are the leading edge and they are trying to develop new technology and new products.

So it would be an unfair burden to put on the venture the speculation of, you know, if we have too much of a market share of the results of our—the fruits of our research that we are going to be attacked because that is a violation. I think that would be a completely erroneous basis to base market-share concepts on.

Mr. MINETA. Just one very quick question about—is the 3-year exclusive use period by participants of developments adequate?

Mr. MCCLOSKEY. I think I would subscribe to the philosophy of Mr. Baxter on that particular point. He feels that what ought to really happen is there ought to be room for competitive joint research ventures. If indeed, that is allowed to happen, then there ought not to be severe strictures on what the individual joint research ventures do with their intellectual property. The competition comes from your ability to meet with others to form competitive joint research ventures.

Now, obviously——

Mr. MINETA. That would require some affirmative action on the part of the Attorney General's Office to say, yes, 3 years or 5 years or your 7 year or their x number of years program is ago; would it not?

Mr. MCCLOSKEY. Well, we have the two approaches to the problem. One, which is you put standards in the legislation and the standards in the legislation include specifics on how you handle intellectual property in all cases, or you have the other version, the other side of it, which is that you insure that there is, indeed, a realistic capability of others to engage in joint research ventures and you put the stick out, the carrot out there that those who do engage in joint research ventures will enjoy the fruits of their labors as long as is realistically possible.

So it would be a varying kind of determination. In Mr. Baxter's personal view, it would be very much the same as an individual company having the right not to license its technology to someone, to its competitors. The joint research venture would have the right not to license it to its competitors.

Mr. MINETA. But I am wondering if that is not throwing the baby out with the bathwater, though, on that latter approach?

Mr. MCCLOSKEY. Well, that can be tempered with a legislative proposal that says there is some standard that we are going to

attach, beyond which we think is unreasonable, whether it be 3, 5, or 7 years. It is sort of like the old adage in the Marine Corps, it is according to the terrain and the situation.

Mr. MINETA. Thank you very much, Mr. Chairman.

Mr. WALGREN. Mr. MacKay.

Mr. MACKAY. Mr. Chairman, I am trying to put together some of this testimony with the hearings we had before the break, and I am not sure I recall all of that accurately, but it seemed to me we had a diagram which was put up which showed a continuum. It started with basic research and then into applied research.

It seemed to me they were talking about it being in the public interest to allow joint ventures at the basic research stage, but not at the applied research stage. Each participant could take the information he or it received from the basic research and go. That became proprietary and it went forward from there. The joint venture could license those basic research results.

I gather you are now saying there should be a period of time during which they would have exclusive use and then licensing. Do you contemplate that same break in the continuum? In other words, the joint venture is strictly for basic research. We are all assuming that?

Mr. MCCLOSKEY. Well, I think the two ends are clear, that there almost no opponents to pure research being done on a joint venture and there are no proponents for pure product development being done in a joint venture. But there were interesting points that were made as it relates to the tools that are used. For example, computer-assisted engineering, design, manufacturing, flexible manufacturing systems, whether these are the proper subject, I would suggest they, indeed, are.

As far as—I think where most would agree is when it becomes product-specific and closer to the marketplace, something that would result in a product within some finite period that would be agreed upon would be inappropriate for the joint venture.

Mr. MACKAY. Then you assume that there will be competing joint ventures. In other words, that you would have the ability to shop around and see what company would be the best for your company if you were a manager of a company in a high-tech, say like Representative Zschau. He would have a chance to look around several joint ventures and see which ones he thinks had the best shot at really coming forth with some breakthroughs.

Mr. MCCLOSKEY. Or to initiate one of his own that he feels ought to be focusing on this area of research and to sort of prospect amongst his members of industry to see whether they are willing to support such a venture.

Mr. MACKAY. Then I want to raise two questions, if we are all playing off the same sheet of music. What public policy reason is there for us to concern ourselves with market share of joint venturers? That is one at the outset. Why should we put that limitation in it; and two, do you think that there should be any limitation which prohibits foreign companies from being participants?

In other words, do you want to play by a different set of rules; and if so, from the public standpoint, why should we keep limitations?

Mr. McCLOSKEY. Answering the second one first, I do not think there ought to be a blanket rule that prohibits foreign participation in a joint venture, but I think it may well be open to whether or not companies—subsidiaries of U.S. companies are unable to participate in such joint ventures in the foreign country. If there is that mirror-image capability, then clearly I would not have any difficulty with it.

As far as the first one, as I understand it, the public policy issue is that if all of industry was engaged in one joint venture, then there is no real incentive for any of the individual components of that industry to do its own privately sponsored research. And so, from a public policy point of view, we want to have a diversity of research, but we do not need to have this diversity that exists today where there are thousands of competitive type activities when 25 will produce about the same amount of innovation for a considerably wiser use of capital and scarce scientific resources.

So there has to be some balance. But the balance that is intended is that there is room for competitive joint research ventures. Whether that in some industries may only be one or two other competitive ones because of the nature of the industry and the nature of the threat, or it may be 10, depending upon, you know.

That is a judgment that can be made and should be made in determining whether or not a joint research venture meets a critical scale.

Mr. MACKAY. I asked a couple of questions in a panel which had a gentleman who represented the Japanese, or at least spoke for, I thought, Japanese technology. It seemed to me that the response was that the fifth generation computer effort in Japan was an effort to compete with IBM, and that IBM had no need to participate in that because it was ahead of where the fifth generation program started.

Will this legislation change the ability internally of companies to compete with IBM in this country?

Mr. McCLOSKEY. I think it would. I think it would make groupings of companies more competitive with IBM. I think there may be situations where IBM ought to be allowed into a joint research venture.

Mr. MACKAY. Well, that is one of the questions I am raising. From a public standpoint, if this is going to be our new philosophy, then why are we going to carry some of the old antitrust philosophy with us and say, well, if you have got more than 25 percent of the market, you cannot play?

Mr. McCLOSKEY. I think you cannot play under an automatic exemption from the antitrust laws, but there may be showing that the critical mass will not be there to conduct the research without IBM in this area. I mean, I can think of a few examples that are exhorbitantly expensive that it may take an IBM with the support of the rest of the industry under carefully developed ground rules that make it make sense, and that would move all of industry forward.

As I mentioned before, the value of that is not just because it makes better computers or better electronic products, but because it makes better products that service all these other industries that use those products in their own manufacturing processes in prod-

uct development, the older technology, automobiles and steel and what not.

Mr. MACKAY. All right. I would like to ask Mr. Myrick, are you suggesting from your diagram that there be no treble damages period?

Mr. MYRICK. Only for R&D joint ventures, yes. We are not going beyond that at this time. The administration's proposal is that we do not take a position regarding the rest of the administration's proposal.

In fact, we recommend that there be consideration of this issue of R&D detrebelization separately from the rest.

Mr. MACKAY. So what you are saying is that you fall within the center circle where you have gone the route of complying with standards and getting a ruling. You are just exempt, immune from liability?

Mr. MYRICK. Right. And you could achieve that result through the mechanism, perhaps, of 1952 or through the mechanism of the Sensenbrenner 3393 bill, or perhaps the Tsongas approach or various approaches that you could use.

The Tsongas approach, of course, is a Senate bill and it involves an actual affirmative determination, as I recall. Is that not correct?

Mr. GADBAW. Yes.

Mr. MYRICK. But any way you get to that point o. standards, there are some who say, well, if you are really within the standards, you do not need to make a disclosure. You are now going to just assume that it is a business risk, and so forth, and that is possible.

If, however, it is desired that all this be done in the light of day, well, disclosure could be possible, as is required in 1952.

But the key thing is that if you are not sure that you are in the standards, or if you may be without the standards but you think, under this circumstance, you are still legal, you can apply to the Justice through disclosure, either for negative clearance or just using its own mechanism of pure disclosure and get an immunity that way.

Mr. MACKAY. And so what would happen if a person or a company was just doing research and development and did not have a joint venture? It would still have treble damages and——

Mr. MYRICK. But it would have no liability under the Sherman—section I of the Sherman Act, but there would be no combination and restraint of trade. The only place it could possibly come would be section II of Sherman. That has been extremely difficult in the recent years to——

Mr. WALGREN. What is section II?

Mr. MYRICK. That is monopolization.

Mr. MACKAY. You do not see the possibility that you are going to accidentally have a side effect that everybody is going to go into a joint venture just strictly for the purpose of achieving immunity or reduced standards?

Mr. MYRICK. Here, again, the question is, What is R&D? How is that defined? R&D is not defined to include price-fixing and that kind of thing so that is out of the game entirely from the beginning.

Then the question is, if you do not meet the standards, certainly the bizarre possibilities that one could conjure up would not meet those standards, but if you do not meet those standards and you disclose to Justice, Justice can stop you. That is the whole—what we call the three-pronged approach to make sure that whatever the standards come out to be, businessmen can find some way to get assurance that what they want to do is good or not good. If it is not good, they do not do it. They know that up front.

I think the key point for us is that it is the risk of the vagary of the law and the risk of being wrong. The risk of the vagaries of the law are treated by the standards and by the ability to file with the Justice Department, and the risk of being wrong is treated by the detrebelization. So that if you are wrong ultimately, and you did not file with Justice, you still are only subject to single damages.

In the end, when you are talking about if we define R&D as being R&D as defined, whatever that definition turns out to be, and there have been a number proposed, if it is really rule of reason and reasonable men, you know—we are applying a reasonable man's test here and not saying it is illegal, per se, in and of itself because of its pernicious effects in every situation, it seems reasonable to not subject people to the prospective treble damage situation which is so onerous.

I can tell you that in my own experience, the concern that you have over the treble damages is not necessarily borne from the fact that you will actually lose. Certainly that is a problem if you did, but it is from the fact that the risks are so high, that the stakes are so high in the game, that you have to spend an enormous amount of money and effort in defending the lawsuits, even though they may be apparently without merit.

You cannot take the risk that you will lose because the amount of money involved is so substantial.

Mr. WALGREN. Let me ask at that point, you seem to be saying that the chilling effect is the possibility of actually being faced with paying a triple-damage claim. Others say that the triple damages caused the suits because apparently there is enough on the table that it is worth any lawyer going after.

Mr. MACKAY. That is the public policy reason to have treble damages.

Mr. MYRICK. If I may say, I must have spoken inartfully because I was taking exact deposition. Yes, it is the concern of the treble damages, but the real concern is that you are going to have to defend all these suits and spend all this tremendous amount of money because there is this potential risk out there.

Mr. WALGREN. My question——

Mr. MYRICK. Even when they are frivolous.

Mr. WALGREN. My question is, the dollar amounts in these kinds of actions seem to be so large that it would seem to me that there is a lot of money on the table anyway to shoot at. Therefore, the tripling does not necessarily stimulate the suit. If there is $1 million on the table, as opposed to $3 million on the table, I know a lot of lawyers that will shoot at $1 million. I am not so sure that they would—or that more lawyers—or they would be more likely to be going after 3 million than 1 million.

My question is, Are we not over a threshold in this area that has established substantial incentive for even the frivolous suits? Do we really undercut the bringing of suits by reducing from treble to single?

But now you, of course, go to immunity, which is different and I am speaking only to reducing it from treble to single. Does that really change the incentive to sue?

Mr. McCloskey. I think it does. I think that if one were to look at what are the potential damages in a true joint research-type venture, you know, one of them is that he was not enabled to participate in the research joint venture so you have some options. You may license them royalty-free; you may do a number of things to make sure he is whole relative to the venture. You may even charge him for that license as if he were a participant from the beginning.

There is that range of reasonable kinds of things that could be done in negotiation with plaintiffs' attorneys. If they brought a case that you thought was colorable and you had not thought of, you would say, OK, we will open our books, we will invite you in, and it may or may not cost you to get in at this point in time and you are made whole.

Remember, joint research is so much earlier than product development or product introduction. There is a capability of handling that kind of a thing, but what we are concerned about on the per se side is not the issue at all. We would agree that there is a public policy need for private attorneys general to participate in actions to insure that there are policemen on such issues as price fixing and allocation of markets and general restrictive practices that have been recognized from time immemorial as per se violations of the antitrust law, but we do not see why in the area of joint research, which is clearly defined, that is so far removed from product introduction, which is a public policy good. We recognize all of the benefits that flow from research, why a per se treble-damages type of penalty should be applied.

I think it is inappropriate. It is chilling and it is unwise as a matter of public policy for us to continue.

Mr. Myrick. I think if one takes the position, as we believe is true, that joint R&D, properly defined, is procompetitive, it seems to be overkill to then punish if it happens to fall outside the purview with the treble damages remedy.

I would also say that in the situation of the patent law, there is a treble damage remedy available, but it is discretionary, it is not mandatory as it is in the antitrust law. It depends upon the egregious nature, or lack thereof, of the offense as to whether or not the damages will be treble. That is another possibility that I had not discussed before with anyone.

Mr. Walgren. Is there a point in this process that we should be worried about the definition of joint research or of research and development? Looking through the various proposals, they may or may not get to that.

Where in the legislative process do we solve the problem of properly defining research and development?

Mr. McCloskey. It seems to me that this is the most appropriate committee in the House to lend its weight to that because you have

had such experience in overviewing all of the science and technology programs. We certainly work with you to help develop them.

Those research and development definitions have also been worked on because of the investment—or the tax credits that apply to research and development. So there is a lot of basic work that can be used and built on in determining a definition.

Mr. MACKAY. Mr. Chairman.

Mr. WALGREN. Mr. MacKay.

Mr. MACKAY. I would like to go back to this flow chart we had a couple of weeks ago. It divides this sort of pipeline into invention, which is idea generation and technology feasibility and then translation, which is product development, prototype, and pilot plant interim manufacture, and then commercialization.

It puts the problem—it makes the separation between the invention and the translation. It seems to be saying—or I would say that it seems that we might have a valid policy reason to relax the standards, reduce the risks for the idea-generation and technology feasibility. That is where the problem is.

One of the things that bothers me is that we are all taking joint R&D and I do not think the problem is in D at all. I do not see any reason to change the standards or do any of this in D.

Mr. MYRICK. May I speak to that issue?

Mr. MACKAY. Yes.

Mr. MYRICK. We have—I cannot give you an SIA position on this point. I can tell you where our discussions are without having reached a resolution on the point myself. I would welcome the opportunity to assist the committee in defining this. We think it is a very important point.

Throughout these discussions, there have been discussions of generally finding the consensus. There have been subdiscussions on what is R&D and what are the standards. The standards have generated a great deal of interest and we have not finished our work in that area and would welcome the opportunity to work with the committee on that.

But in the area of research and development, initially there was a great deal of position in favor of pure research. But then people began to ask, what is that? Is that finding out whether or not quarks make up protons or is that finding out how one makes a four-megabit ram or what is that?

We do not find—we have struggled with it quite a lot. We cannot find a vehicle for saying what is pure research without getting it down to the point where it is trivial. Things that would be done in the back room of an MIT laboratory, or at Stanford, or somewhere else.

There is—in every amount or aspect of research that is useful to industry ultimately, there is some development; there is some bringing of that research, that basic pure research, forward. How can it be used? Where is it applicable in our industry?

So what we have worked for is finding some set of words that would bring it down a reasonable distance into what you would call development, but not all the way to the point that Mr. McCloskey was saying of manufacturing a product.

Nobody wants—that I know of in our discussions, has raised the point that they would want R&D exemption all the way down to

being able to manufacture products and so forth. That is manufacturing.

But when I raise the issue on the word "manufacturing" in our business, I also have to say that part of the development in our business is the processes. Those processes are very arcane things and very difficult to come up with. Sometimes they take years to develop.

There is much research in our business and certainly part of the development as anything is for us. So I cannot say that it is easy to use the term "pure research" and say that it accomplishes the task. It does not do it.

There is some definition that is required and we are still working on that definition. I would say that the administration has put a definition which is a rather substantial one.

Mr. MCCLOSKEY. I would venture to suggest that in the fifth generation research and development project in Japan, that they are going to go one step beyond just saying those are the concepts and we have got all narrowed down. They are going to try to get some type of a prototype of something that embodies those concepts to see whether, in fact, those work. So it is a very difficult question.

But there is not any question that the Japanese have successfully competed amongst themselves where they have jointly done some VLSI joint research. They then get to a point where they compete very vigorously, one with another. I want to insure from your viewpoint and mine that that competition, in fact, is what we enhance and not——

Mr. MINETA. Would the gentleman yield?

Mr. MACKAY. Sure.

Mr. MINETA. I just wonder whether or not they are really—I do not think of them as being innovative when it comes to new things. They are good at something else that has already been developed and somehow refining it for commercialization or for application in use somewhere else.

I am not sure that they are good at innovation.

Mr. MCCLOSKEY. I think that has historically been true, but I think there is a greater realization today in Japan that they have to make a greater investment in these areas——

Mr. MINETA. That is where they are doing product development, not basic research. I think that is the point that Mr. MacKay is driving at.

Where do we——

Mr. MCCLOSKEY. Fifth generation. I think the fifth generation research project in Japan is viewed by industry as more than just applying others' ideas; that they are going to be truly innovative and that is what they are going to attempt to do.

Mr. MINETA. And then under their system, once they develop that fifth generation computer, then other companies are able to have access to that based on their paying a royalty, right.

Mr. MCCLOSKEY. I believe in Japan, in the case of their VLSI program, they had government licenses, government funded, and there was a question at one time whether or not the companies that did the research were going to be able to extend the license under some other research and development innovations that they had made——

Mr. MINETA. Did they get that kind of exclusivity on that provision, or under that in Japan?

Mr. MCCLOSKEY. At one time, they were going to try to restrict their ability to license the U.S. companies who had cross licenses with those companies. That, I understand, has been worked out—you may know more about that—that, in fact, they got sublicensing rights, I believe, that enabled them to do that.

Mr. MINETA. OK.

Mr. MYRICK. In response to your earlier question, Mr. Walgren, of the place to establish that R&D definition, I think it probably is this committee. If appropriately defined and if combined with the approach that we are proposing to you now, and I think really was heralded by Congressman Zschau in his earlier comments—by the way, I have not spoken to Congressman Zschau before—we would have, what I think would be a very useful, and appropriate, and properly narrow bill for the industry.

Mr. GREGG. May I follow up on that, and Mr. McCloskey was making this point, on this issue of IBM and when does IBM get to participate without being a target—well, we accept the fact that they are not going to make it under the standards. The standards are going to have a limitation that knocks IBM out. But if we have this secondary level where you can then take a shot at, are we not then setting up a confrontation between the Justice Department policy concept of what is public policy on the issue, purely on the issue of antitrust and market share, which is what Justice looks at, and the national policy question of science? When should IBM be a participant because the science requires that IBM be the participant?

Is the Justice Department a proper entity to adjudicate that issue?

Mr. MCCLOSKEY. I think that is an insightful question. I think that the reality is—5 or 6 years ago, I remember talking to the senior vice president of IBM and he was musing about some work that they wanted to do on the Josephson junction, which was a highly promising field of technology which they felt that if they and Bell Labs could have joint forces on that, they could move it forward 3, 4, 5 years, or whatever.

There was no mechanism for even the—you know, that was just musing. There was no way that they could do it. It would require an act of the legislature. I think you are right. I think that maybe in either the Department of Commerce or in the National Science Foundation or wherever, there could be advisory opinions on the importance as a matter of national policy on a particular specific issue that would enable somebody who obviously is without the guidelines that would give him the right to self-declare, so to speak, and have that input.

Mr. GREGG. That was going to be my question. Assuming the bill is structured around the concepts which Mr. Myrick has outlined here, which is basically a grafting of the Zschau concepts on the proposal of Mr. Synar, would there not also have to be included in there some sort of overview agency, a combination of the Office of Science Policy and the Justice Department to make the decision? You have got two policy conflicts here. You could not leave that

decision to Justice, which is going to simply rule on the issue of whether or not they control the market share; you have——

Mr. MCCLOSKEY. Absolutely. You have got to have——

Mr. GREGG [continuing]. Science determining whether or not to control the market share is——

Mr. MCCLOSKEY [continuing]. Is irrelevant in this issue.

Mr. MYRICK. May I say on this point, I do not want to speak for Justice, but I have been reading this speech of Mr. Baxter and Mr. Baxter's address to market share is not—does not read to me to be the same as the approaches to market share that are presently in the Sensenbrenner——

Mr. GREGG. Mr. Baxter is temporary.

Mr. MYRICK. Yes. [Laughter.]

Mr. MACKAY. And we no longer have a legislative veto. [Laughter.]

So we have got to, for once, sit down and try to say what it is we mean.

Mr. GREGG. He only has 6 more years. [Laughter.]

Mr. MYRICK. Shall I leave this point? [Laughter.]

Mr. MCCLOSKEY. I think you are right. I think that when there are issues of national policy consideration in terms of scientific policy and overriding consideration, the Justice Department would not be the proper one to make the certification that this is an overriding participant—yes.

They ought to have expert input from either the National Science Foundation or the President's Science Adviser or whoever is set up to do that.

Mr. WALGREN. Would it be a fair footnote here to say that one of the relatively good arguments that was made this morning was that you do not want IBM in these efforts? The gap you are really trying to close; if you are looking at a systemmatic comparison between the United States and other areas, the gap you are really trying to close is apparently diversified, medium-sized joint research and development combinations.

The idea being that many of our small firms are left out now by virtue of their size and you want them to be able to participate in this without being prejudiced merely because of their size.

Mr. MCCLOSKEY. I think you are right, but I think we were off on a theoretical aside that said if you want it—something that reached a certain scale and was pure research, absolutely nothing further down the road, and as a matter of national policy, we really do want to do that research and it is going to require two or three of the biggest research organizations getting together to do it; is there a mechanism to achieve that? There is not unless it is the Government labs because they are not going to be able to get together.

Mr. WALGREN. OK. Unless other members have further—

Mr. MACKAY. Mr. Chairman, I just—in terms of the subcommittee's proceeding, I see this question of defining "research" as being a very central issue. From my own standpoint, if it could be defined tightly enough, then all of the other loosening would be very reasonable. If we cannot define that, then I would be very hesitant to undo the treble damages and a lot of other things because I

think we are going to set off a whole new wave of gamesmanship with a whole bunch of people who are smarter than we are.

That is why we had treble damages in the first place so that the smart guys could sue the smart guys. Government did not have to get into it. So I would think we ought to really zero in on that just as one comment.

Mr. WALGREN. I think that point is well taken. Certainly, it would be—a lot of members would be sympathetic to that.

Well, in the interest of time, thank you very much, gentlemen, we appreciate your contribution this morning and we look forward to other contact with you, either in writing or otherwise, and we appreciate your coming.

Mr. MCCLOSKEY. Thank you.

Mr. MYRICK. Thank you.

Mr. WALGREN. The last panel is Robert Price, the president of Control Data Corp.; Marc Rosenberg, the executive director of the National Coalition for Science and Technology; and Paul Spillane, the vice president of Sperry Corp., here representing, I believe, the American Electronics Association.

Would those gentlemen come forward, please, and the same ground rules apply. Your written statements will be made part of the record and we would appreciate your outlining or summarizing in whatever way you feel is most effective to communicate to the committee.

Why do we not start in the order that I called you, starting with Mr. Price.

Welcome to the committee.

STATEMENTS OF ROBERT M. PRICE, PRESIDENT, CONTROL DATA CORP., ACCOMPANIED BY STEVEN OLSON, ASSOCIATE GENERAL COUNSEL, CONTROL DATA CORP.

Mr. PRICE. Thank you very much.

My name is Robert Price. I am president of Control Data Corp., with headquarters in Minneapolis, Minn. I am accompanied today by Steven Olson, who is the associate general counsel for Control Data, and would like to thank all of you, and you, Mr. Chairman, for having me here today. Also to thank you and to commend you for the initiative in expediting these hearings on an enormously important subject.

During the hearings in late June, you heard several witnesses stress the severe challenges to our Nation's technological and international competitive position. With all of that and all the attention that that subject has been given of late, I do not think there is any reason for me to belabor the point.

Also, to mention that meeting those challenges is not a single faceted task. It will require many and varied actions. But by far the greatest and most rapid progress can be achieved by increasing our efficiency and developing and applying technology.

So, given the scarcity of resources, achievement of such efficiency will require a vast increase in technological cooperation. There is just no other way and that, of course, is exactly what bills such as H.R. 1952 and 3393 are designed to accomplish.

So I want to devote my remarks today just then to the need of such legislation and the form. As you know from the recent testimony of Admiral Inman and my own colleagues, John Lacey and Steve Olson, Control Data was the catalyst in the formation of a research and development joint venture.

This venture, known as the Microelectronics and Computer Technology Corp., or MCC, is a cooperative effort by U.S. computer and semiconductor companies to develop fundamental technologies to which the partners can each add their own value and so cooperation in this manner enhances the ability of each of them to develop products and services of individual conception and design.

Participating companies so far include Advanced Micro Devices, Allied Corp., Control Data, Digital Equipment, Harris, Honeywell, Martin-Marietta, Mostek, Motorola, National Semiconductor, NCR, RCA, and Sperry.

By focusing on a broad range of basic technologies that participants could not individually sustain, research consortia such as MCC will spur increased technological innovation; improve productivity by enabling the participants to take advantage of the economies of scale; foster competition by accelerating the diffusion of technology throughout the economy, but most especially to small businesses and help insure the continued capability of firms to remain as independent and viable competitors.

That is an outcome much more desirable than the alternative, which is an extended pattern of merger activities.

MCC and similar ventures in any other industry can thus provide a meaningful procompetitive private-sector response to the dual challenges of resource shortages and foreign government-led industrial policies.

Our own experience with regard to MCC underscores the urgent need for Congress to act with regard to R&D joint ventures because the fear of inadvertently violating U.S. antitrust laws, and the threat of treble damages are significant deterrence to undertaking collaborative R&D.

Business executives receive legal advice fraught with uncertainty, where the ultimate legality or illegality on the one hand, and on the other hand, you have all heard that, of their actions, they are told, can only be conclusively determined by litigation. That is a complex and expensive and totally nonproductive exercise.

Now, some people have told me that our success in launching MCC would suggest that clarification of the U.S. antitrust laws is unnecessary. I disagree. MCC is, to be sure, completely lawful, but the formation of MCC was certainly neither typical nor was it easy.

Despite the obvious resource shortages—in fact, you might say the overwhelming need in the face of increased demand and the urgency of the world competitive environment—it took over 18 months for MCC to proceed from an idea to a corporate shell and that was preceded by more than 2 years of exploratory work on my part and some 15 years of experience on the part of my company with various forms of cooperation.

During this formative period, the staff at Control Data and myself devoted countless hours trying to overcome the skepticism and reticence of executives less familiar with a cooperative approach to the problems. Not the least of those problems they raised

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was the so-called barrier of U.S. antitrust laws, a conviction by many that irrespective of MCC's legality, such cooperation was inevitably an invitation to become a defendant in at least one horrendously expensive and time-consuming lawsuit.

Our task would have been significantly more effective and timely if we could have pointed to statutory criteria providing an antitrust safe harbor for clearly procompetitive cooperation.

Go just beyond that to what has happened 5 months after the launching of this experimental craft we call MCC. Well, for one thing, a San Francisco antitrust lawyer who generally represents treble damage plaintiffs has written a threatening letter to each MCC shareholder. There have been introduced into Congress several bills addressing joint R&D which has, in fact, triggered a national debate wherein all sides readily agree that the present antitrust laws are clearly ambiguous.

The confusion under the current law is greatly compounded by the fact that even if the Justice Department should agree, as it did with MCC, that an R&D venture passes muster, that determination does not bind future administrations, nor does it protect the venture from private lawsuits such as the one threatened from San Francisco.

So the sum and substance of the MCC experience does not support those questioning the need for congressional action, but in fact, it underscores the need for prompt clarification of our antitrust laws as they relate to this vital subject of research and development cooperation.

So, in short, we need to change the tenor of the current laws, from laws that sometimes permit technological cooperation, to legislation that encourages it, and that, of course, is the purpose of the bills that you are hearing.

H.R. 1952, introduced originally by Representatives Synar, Wyden, Gephardt, and Zschau, embodies a comprehensive and effective approach which we strongly support. It does not change, but seeks to clarify U.S. antitrust laws.

Under its provisions, Congress would prescribe statutory criteria for lawfully organizing and conducting such ventures, and if they were met, would shield a venture from antitrust attack.

Under this approach which we call self-certification, a set of objective standards or rules would be enacted, and those companies designed to cooperate could then plan and implement their activities according to them before the fact. This would remove existing uncertainty because companies would know in advance how to organize and conduct themselves.

The standards or rules reflected in H.R. 1952 insure:

First, an open membership to any eligible U.S. firm;

Second, that the joint venture activities are limited to R&D, which is defined in the bill, and that each individual member will be free to conduct its own R&D and exploit venture discoveries as each sees fit;

Fairness in the way the venture is operated and managed;

Rapid dissemination and use of venture discoveries, including the requirement that even nonmembers be licensed after 3 years; and

Public awareness of the existence of the venture and that it is being operated in conformity with the law's requirements.

If a venture complies with those standards, its activities would not be subject either to criminal or treble damage liability.

Congress will have declared such compliance to be presumptively legal. Of course, activities falling outside of the standards would remain fully subject to the dual deterrents of government and private damage actions.

We favor the appoach of H.R. 1952 and H.R. 3393, Mr. Sensenbrenner's bill, over that contained in those bills which would require any venture to be certified by the Justice Department. We do not think it is necessary or even desirable that another bureaucracy be created to solve the problem.

We would prefer a public policy discussion and debate now, and the law resulting from that that the private sector could itself understand and apply. Further, to be successful, such ventures just have to remain fluid with strategic decisions constantly reviewed and redirected in the light of experience provided by the process. A rigid certificate authorizing certain described venture activities is wholly inappropriate to a research environment.

We do agree with provisions in other bills, and particularly in H.R. 3393 which, in recognition of the critical importance of R&D to the country's future, would provide that any rule-of-reason liability arising out of an activity defined by Congress as research and development should be limited to actual damages, and not treble damages; and in any litigation arising out of such activity, attorneys' fees should be awarded to the prevailing party, defendants as well as plaintiffs. This point in particular speaks to the question that was raised in the previous panel about the incentives and disincentives.

This is equally important, this particular for attorneys' fees is just as important as a matter of treble damages.

Mr. Chairman, we urge this committee and your colleagues in the House to act favorably on H.R. 1952 and consider adding these other points.

We believe that will make a significant contribution to fostering increased R&D and therefore, enhancing our Nation's international competitiveness.

Thank you.

[The biographical sketch and the prepared statement of Mr. Price follow:]

Biography

CONTROL DATA CORPORATION

ROBERT M. PRICE
PRESIDENT AND CHIEF OPERATING OFFICER

Mr. Price, 51, is President and Chief Operating Officer of Control Data. He joined the company in 1961, became director of International Operations in 1963, was elected Vice President of Sales in 1967, was named Senior Vice President and Group Executive of the Services Group in 1972 and President of the Computer Company in 1977.

He was elected President and Chief Operating Officer in 1980. Before joining Control Data, Mr. Price held positions at General Dynamics, Georgia Institute of Technology and Standard Oil of California.

He is a Phi Beta Kappa graduate of Duke University and received his masters degree in applied mathematics from Georgia Institute of Technology.

Mr. Price is a Director of Commercial Credit Company, member of the Board of Directors of the Guthrie Theater Foundation, Director of the Minnesota Opera Board, member of the Governing Council of the Courant Institute of Mathematical Sciences of New York University and a member of the Board of Visitors of the Fuqua School of Business of Duke University.

He became Control Data Director in 1977 and is a member of the executive committee and the joint committee of directors and senior management personnel.

STATEMENT OF
ROBERT M. PRICE
PRESIDENT & CHIEF OPERATING OFFICER, CONTROL DATA CORPORATION

BEFORE THE
HOUSE SUBCOMMITTEE ON SCIENCE, RESEARCH & TECHNOLOGY

July 12, 1983

MY NAME IS ROBERT M. PRICE, PRESIDENT OF CONTROL DATA CORPORATION, WITH HEADQUARTERS IN MINNEAPOLIS, MINNESOTA. BUSINESSES, INDUSTRIES, EDUCATIONAL INSTITUTIONS, AND GOVERNMENTS THROUGHOUT THE WORLD USE CONTROL DATA COMPUTER SERVICES AND SYSTEMS, PERIPHERAL PRODUCTS, AND FINANCIAL SERVICES.

I WISH TO THANK YOU, MR. CHAIRMAN, FOR THE OPPORTUNITY TO BE HERE TODAY, AND TO COMMEND YOU FOR YOUR INITIATIVE IN EXPEDITING HEARINGS ON H.R. 1952 -- LEGISLATION TO ENCOURAGE COOPERATIVE RESEARCH AND DEVELOPMENT THROUGH CLARIFICATION OF THE UNCERTAINTIES IN THE INTERPRETATION AND APPLICATION OF U.S. ANTITRUST LAWS.

DURING YOUR LATE JUNE HEARINGS YOU HEARD SEVERAL WITNESSES STRESS THE SEVERE CHALLENGES TO OUR NATION'S TECHNOLOGICAL AND INTERNATIONAL COMPETITIVE POSITION. MEETING THESE CHALLENGES WILL REQUIRE MANY AND VARIED ACTIONS. HOWEVER, BY FAR THE GREATEST AND MOST RAPID PROGRESS CAN BE ACHIEVED BY INCREASING OUR EFFICIENCY IN DEVELOPING AND APPLYING TECHNOLOGY. AND GIVEN THE SCARCITY OF AVAILABLE RESOURCES -- BOTH HUMAN AND FINANCIAL -- ACHIEVEMENT OF SUCH EFFICIENCY WILL REQUIRE A VAST INCREASE IN TECHNOLOGICAL COOPERATION. THAT, MR. CHAIRMAN IS EXACTLY WHAT H.R. 1952 CAN HELP TO STIMULATE. TODAY, THEREFORE, I WANT TO DEVOTE MY BRIEF REMARKS TO BOTH THE NEED FOR SUCH LEGISLATION AND THE FORM, I BELIEVE, IT SHOULD TAKE.

o THE NEED FOR LEGISLATION:

AS YOU KNOW FROM THE RECENT TESTIMONY OF ADMIRAL BOBBY INMAN AND MY OWN COLLEAGUES--JOHN LACEY AND STEVEN OLSON, CONTROL DATA WAS THE CATALYST IN THE FORMATION OF A RESEARCH AND

DEVELOPMENT JOINT VENTURE IN THE AREA OF MICROELECTRONICS AND COMPUTER SCIENCE. THIS VENTURE, KNOWN AS MICROELECTRONICS AND COMPUTER TECHNOLOGY CORPORATION (MCC), IS A COOPERATIVE EFFORT BY AMERICAN COMPUTER AND SEMICONDUCTOR COMPANIES TO DEVELOP A BROAD BASE OF FUNDAMENTAL TECHNOLOGIES FOR USE BY MEMBERS WHO WILL, IN TURN, EACH ADD THEIR OWN VALUE AND CONTINUE TO COMPETE WITH PRODUCTS AND SERVICES OF INDIVIDUAL CONCEPTION AND DESIGN. PARTICIPATING COMPANIES SO FAR INCLUDE ADVANCED MICRO DEVICES, ALLIED CORPORATION, CONTROL DATA, DIGITAL EQUIPMENT CORPORATION, HARRIS, HONEYWELL, MARTIN-MARIETTA, MOSTEK, MOTOROLA, NATIONAL SEMICONDUCTOR, NCR, RCA AND SPERRY.

BY FOCUSING ON A BROAD RANGE OF BASIC TECHNOLOGIES THAT PARTICIPANTS COULD NOT INDIVIDUALLY SUSTAIN, RESEARCH CONSORTIA SUCH AS MCC WILL SPUR INCREASED TECHNOLOGICAL INNOVATION; IMPROVE PRODUCTIVITY BY ENABLING PARTICIPANTS TO TAKE ADVANTAGE OF THE ECONOMIES OF SCALE; FOSTER COMPETITION BY ACCELERATING

THE DIFFUSION OF TECHNOLOGY THROUGHOUT THE ECONOMY AND PARTICULARLY TO SMALL BUSINESS; AND HELP INSURE THE CONTINUED CAPABILITY OF FIRMS TO REMAIN AS INDEPENDENT AND VIABLE COMPETITORS -- AN OUTCOME MORE DESIRABLE THAN AN EXTENDED PATTERN OF MERGER ACTIVITIES. MCC AND SIMILAR VENTURES IN OTHER INDUSTRIES CAN THUS PROVIDE A MEANINGFUL PRO-COMPETITIVE PRIVATE-SECTOR RESPONSE TO THE DUAL CHALLENGES OF RESOURCE SHORTAGES AND FOREIGN GOVERNMENT-LED INDUSTRIAL POLICIES.

OUR OWN EXPERIENCE WITH THE FORMATION OF MCC UNDERSCORES THE URGENT NEED FOR CONGRESS TO ACT TO CLEAR AWAY THE UNCERTAINTIES IN THE INTERPRETATION AND APPLICATION OF ANTITRUST LAWS AS THEY RELATE TO R&D JOINT VENTURES. THE FEAR OF INADVERTENTLY VIOLATING U.S. ANTITRUST LAWS AND THE THREAT OF TREBLE DAMAGES ARE SIGNIFICANT DETERRENTS TO UNDERTAKING COLLABORATIVE R&D.

BUSINESS EXECUTIVES RECEIVE LEGAL ADVICE FRAUGHT WITH UNCERTAINTY -- WHERE THE ULTIMATE LEGALITY OR ILLEGALITY OF THEIR ACTIONS, THEY ARE TOLD, CAN ONLY BE CONCLUSIVELY DETERMINED BY LITIGATION -- A COMPLEX AND EXPENSIVE AND TOTALLY NON-PRODUCTIVE EXERCISE.

SOME HAVE SAID THAT OUR SUCCESS IN LAUNCHING MCC WOULD SUGGEST THAT CLARIFICATION OF U.S. ANTITRUST LAWS IS UNNECESSARY. I DISAGREE. MCC IS, TO BE SURE, COMPLETELY LAWFUL. BUT THE FORMATION OF MCC WAS NEITHER TYPICAL NOR EASY.

DESPITE OBVIOUS RESOURCE SHORTAGES IN THE FACE OF INCREASED DEMAND, AND THE URGENCY OF THE WORLD COMPETITIVE ENVIRONMENT, IT TOOK OVER 18 MONTHS FOR MCC TO PROCEED FROM AN IDEA TO A CORPORATE SHELL. EVEN NOW, NEARLY TWO YEARS LATER, MCC HAS YET TO ENGAGE IN ANY SUBSTANTIVE RESEARCH ACTIVITY.

DURING THAT PERIOD, BOTH BILL NORRIS, CONTROL DATA'S CHAIRMAN, AND I DEVOTED COUNTLESS HOURS TRYING TO OVERCOME THE SKEPTICISM AND RETICENCE OF EXECUTIVES LESS FAMILIAR WITH A COOPERATIVE APPROACH TO PROBLEMS. AND A SUBJECT THEY REPEATEDLY RAISED WAS THE SO-CALLED "BARRIER" OF U.S. ANTITRUST LAWS, -- A CONVICTION BY MANY THAT IRRESPECTIVE OF MCC'S LEGALITY, SUCH COOPERATION WAS INEVITABLY AN INVITATION TO BECOME A DEFENDANT IN AT LEAST ONE HORRENDOUSLY EXPENSIVE AND TIME CONSUMING LAW SUIT. OUR TASK WOULD HAVE BEEN SIGNIFICANTLY MORE EFFECTIVE AND TIMELY IF WE COULD HAVE POINTED TO STATUTORY CRITERIA PROVIDING AN ANTITRUST "SAFE-HARBOR" FOR CLEARLY PRO-COMPETITIVE COOPERATION.

AND WHAT HAS HAPPENDED FIVE MONTHS AFTER THE LAUNCHING OF THIS EXPERIMENTAL CRAFT WE CALL MCC? A SAN FRANCISCO ANTITRUST LAWYER, WHO GENERALLY REPRESENTS TREBLE DAMAGE PLAINTIFFS HAS WRITTEN A THREATENING LETTER TO EACH MCC SHARE HOLDER! AND THERE HAVE BEEN INTRODUCED IN CONGRESS SEVERAL BILLS ADDRESSING

JOINT R&D WHICH HAS IN TURN TRIGGERED A NATIONAL DEBATE WHEREIN ALL SIDES READILY AGREE THAT PRESENT ANTITRUST LAWS ARE "CLEARLY AMBIGIOUS." THE CONFUSION UNDER CURRENT LAW IS GREATLY COMPOUNDED BY THE FACT THAT, EVEN IF THE JUSTICE DEPARTMENT SHOULD AGREE (AS .T DID WITH MCC) THAT AN R&D VENTURE PASSES MUSTER, THAT DETERMINATION DOES NOT BIND FUTURE ADMINISTRATIONS NOR DOES IT PROTECT THE VENTURE FROM PRIVATE SUITS.

SO THE SUM AND SUBSTANCE OF THE MCC EXPERIENCE DOES NOT SUPPORT THOSE QUESTIONING THE NEED FOR CONGRESSIONAL ACTION, BUT IN FACT, UNDERSCORES THE NEED FOR PROMPT CLARIFICATION OF OUR ANTITRUST LAWS AS THEY RELATE TO R&D COOPERATION. IN ORDER TO BRING ABOUT WIDE-SPREAD COOPERATION, WE NEED TO CHANGE THE TENOR OF CURRENT LAWS -- FROM LAWS THAT SOMETIMES PERMIT TECHNOLOGICAL COOPERATION -- TO LEGISLATION THAT ENCOURAGES IT, AND THIS IS THE PURPOSE OF H.R. 1952.

o FORM OF LEGISLATION:

H.R. 1952 INTRODUCED ORIGINALLY BY REPRESENTATIVES SYNAR, WYDEN, GEPHART AND ZSCHAU, EMBODIES A COMPREHENSIVE AND EFFECTIVE APPROACH, WHICH WE STRONGLY SUPPORT. IT DOES NOT CHANGE, BUT SEEKS TO CLARIFY, U.S. ANTITRUST LAWS. UNDER ITS PROVISIONS, CONGRESS WOULD PRESCRIBE STATUTORY CRITERIA FOR LAWFULLY ORGANIZING AND CONDUCTING JOINT R&D VENTURES WHICH, IF MET, WOULD SHIELD A VENTURE FROM ANTITRUST ATTACK. UNDER THIS "SELF-CERTIFICATION" APPROACH, A SET OF OBJECTIVE STANDARDS OR RULES WOULD BE ENACTED, AND THOSE COMPANIES DESIRING TO COOPERATE IN R&D COULD THEN PLAN AND IMPLEMENT THEIR ACTIVITIES ACCORDINGLY. THIS WOULD REMOVE EXISTING UNCERTAINTY BECAUSE COMPANIES WOULD KNOW IN ADVANCE HOW TO ORGANIZE AND CONDUCT THEIR R&D JOINT VENTURES.

o THE STANDARDS OR RULES REFLECTED IN H.R. 1952 ENSURE:

OPEN MEMBERSHIP TO ANY ELIGIBLE U.S. FIRM (SEC. 4(b));

THAT THE VENTURE'S JOINT ACTIVITIES ARE LIMITED TO R&D AND THAT EACH INDIVIDUAL MEMBER WILL BE FREE TO CONDUCT ITS OWN R&D AND EXPLOIT VENTURE DISCOVERIES AS EACH SEES FIT (SEC. 4(c));

FAIRNESS IN THE WAY THE VENTURE IS OPERATED AND MANAGED (SEC. 4(d));

RAPID DISSEMINATION AND USE OF VENTURE DISCOVERIES, INCLUDING THE REQUIREMENT THAT EVEN NON-MEMBERS BE LICENSED AFTER THREE YEARS (SEC. 4(d)); AND,

PUBLIC AWARENESS OF THE EXISTENCE OF THE VENTURE AND THAT IT IS BEING OPERATED IN CONFORMITY WITH THE LAW'S REQUIREMENTS (SEC. 5).

IF A VENTURE COMPLIES WITH THESE STANDARDS, ITS ACTIVITIES WOULD NOT BE SUBJECT TO EITHER CRIMINAL OR TREBLE DAMAGE LIABILITY. CONGRESS WILL HAVE DECLARED SUCH COMPLIANCE TO BE PRESUMPTIVELY LAWFUL. OF COURSE, ACTIVITIES FALLING OUTSIDE OF THE STANDARDS WOULD REMAIN FULLY SUBJECT TO THE DUAL DETERRENTS OF GOVERNMENTAL AND PRIVATE DAMAGE ACTIONS.

WE PREFER THIS APPROACH OVER THAT CONTAINED IN THOSE BILLS WHICH WOULD REQUIRE ANY VENTURE TO BE "CERTIFIED" BY THE JUSTICE DEPARTMENT. WE DO NOT THINK IT EITHER NECESSARY OR DESIRABLE THAT ANOTHER BUREAUCRACY BE CREATED TO SOLVE THIS PROBLEM. WE WOULD PREFER A LAW THAT THE PRIVATE SECTOR COULD ITSELF UNDERSTAND AND APPLY. FURTHER, TO BE SUCCESSFUL, SUCH VENTURES MUST REMAIN FLUID, WITH STRATEGIC DECISIONS CONSTANTLY REVIEWED AND REDIRECTED IN LIGHT OF EXPERIENCE PROVIDED BY THE PROCESS. A RIGID CERTIFICATE AUTHORIZING CERTAIN DESCRIBED VENTURE ACTIVITIES IS WHOLLY INAPPROPRIATE TO THIS ENVIRONMENT.

BUT WE AGREE WITH PROVISIONS IN OTHER BILLS WHICH, IN RECOGNITION OF THE CRITICAL IMPORTANCE OF R&D TO OUR COUNTRY'S FUTURE, PROVIDE THAT:

ANY RULE OF REASON LIABILITY ARISING OUT OF AN ACTIVITY DEFINED BY CONGRESS AS "RESEARCH AND DEVELOPMENT" SHOULD BE LIMITED TO ACTUAL DAMAGES, NOT TREBLE DAMAGES; AND

IN ANY LITIGATION ARISING OUT OF SUCH ACTIVITY, ATTORNEYS' FEES SHOULD BE AWARDED TO THE PREVAILINC PARTY -- DEFENDANTS AS WELL AS PLAINTIFFS.

MR. CHAIRMAN, WE URGE THIS COMMITTEE, AND YOUR COLLEAGUES IN THE HOUSE, TO ACT FAVORABLY ON H.R. 1952 AND CONSIDER ADDING THESE OTHER POINTS. WE BELIEVE THIS WILL MAKE A SIGNIFICANT CONTRIBUTION TO FOSTERING INCREASED R&D AND THEREFORE TO ENHANCING OUR NATION'S INTERNATIONAL COMPETITIVENESS.

THANK YOU. I WOULD BE DELIGHTED TO RESPOND TO ANY OF YOUR QUESTIONS

Mr. WALGREN. Thank you very much, Mr. Price.
Mr. Rosenberg.

STATEMENT OF MARC ROSENBERG, EXECUTIVE DIRECTOR, NATIONAL COALITION FOR SCIENCE AND TECHNOLOGY FOR GITTA KURLAT, VICE PRESIDENT, EIKONIX CORP. (NATIONAL COALITION FOR SCIENCE AND TECHNOLOGY)

Mr. ROSENBERG. Mr. Chairman, my name is Marc Rosenberg; I am the executive director of the National Coalition for Science and Technology.

Gitta Kurlat, a member of our advisory board's task force on antitrust laws affecting research and development had been scheduled to present our testimony today, however Mrs. Kurlat was involved in an accident and could not travel to Washington for today's hearings.

With the committee's permission, we would like to submit Mrs. Kurlat's prepared statement on behalf of the Coalition for the record.

Mr. WALGREN. Without objection.

Mr. ROSENBERG. I will present a brief oral summary of that testimony and would be glad to respond to any questions.

By way of personal introduction, I would like to mention that I served as staff director of the Small Business Committee's Antitrust Subcommittee during the 96th Congress and prior to that, I was Charles Mosher's chief legislative assistant when he was the ranking minority member of this committee.

I joined the National Coalition for Science and Technology in March of this year. The Coalition is a organization of scientists, educators, business people, and engineers who are deeply concerned about the state of science education and research and industrial productivity in America.

NCST's membership includes individuals, corporations, and professional societies cutting across the spectrum of science and technology.

In general, we support amending the antitrust laws to facilitate joint research ventures. However, we would like to suggest some modifications to the pending legislation.

Mr. Chairman, our society has moved rapidly into the era of high-technology industries. Microelectronics and computers come most readily to mind, but we can look also at biotechnology, aerospace, energy and other fields.

In all of these areas, there is a dramatic increase in research expenses as we move from one level of technological development to the next. Furthermore, we must recognize that technological advances are increasingly dependent upon progress in basic science. In these new high-technology industries, there is a very fast transfer from basic research to applied technology.

In our Nation's traditional approach to R&D, that of numerous companies pursuing parallel research programs, it may not be appropriate to meet research requirements in these new technologies. First, there is the simple fact that as the cost of the research rises steeply, the number of companies who are capable of making such expenditures drops rather quickly.

Second, there is only a limited number of researchers trained to conduct advanced research in certain sophisticated technologies.

Finally, we have to look at what our foreign competitors are doing.

There is a growing imbalance between the resources that U.S. companies are able to devote to specific research projects and what their foreign competitors are able to do. Even domestically, there is a growing disparity between the research capabilities of our very largest corporations versus those of even the second- and third-tier companies.

The truly small businesses are already being priced out of basic research in some technologies.

Joint research ventures make sense. They allow firms to share costs and pool resources for R&D projects that are bigger and more complex than they could perhaps undertake individually. They help to make more efficient use of limited resources, helping to offset the differences in corporate size and resources.

We already have some examples of joint research ventures in the United States, but these are the exceptions, not the rule. A number of legal questions remain. In large companies, with a great deal of legal talent available to them have gone ahead and risked establishing joint research ventures. Smaller companies, who do not have such extensive legal resources, are understandably reluctant to expose themselves to lengthy and expensive antitrust litigation.

A key legal factor encouraging joint research ventures lately seems to be the Reagan administration's perceived lenient attitude toward the antitrust laws. It seems to us to be a very risky proposition for businesses to make major, long-term investments based upon the discretionary and reversible opinions of political appointees.

Before we can expect to see more companies, especially smaller sized firms, joining and investing in joint research ventures, there must be a clearly defined set of guidelines as to what is allowable under the antitrust laws, and there must be a reasonable assurance against litigation if those standards are met.

We believe there are valid reasons why the Government should be concerned about the potential for antitrust problems growing out of joint ventures, but those problems can be avoided and the public's interest protected if legislation like that proposed by Congressman Synar and Senator Mathias, H.R. 1952 and S. 737, or by Senator Tsongas, S. 568, is adopted.

Mr. Chairman, the following describes the general principles the National Coalition for Science and Technology believes should be applied in evaluating proposed legislation to amend the antitrust laws affecting joint research ventures.

Based upon these principles, we will recommend some changes be made in H.R. 1952, the bill which is pending before this subcommittee. NCST believes that any legislation amending the antitrust laws to facilitate joint research ventures should incorporate all of the following points:

It should strictly limit the joint venture to R&D only, with no manufacturing or marketing of products by the joint venture;

It should allow flexibility in structuring contribution requirements, thus encouraging participation by smaller firms;

It should assure all participants of the venture equal access to the research results;

It should require prior review of the proposed venture by Government officials;

It should require expeditious handling of any request for Government review; and

It should preserve the right to bring civil action under the antitrust laws, but limit liability to simple damages if a sanctioned joint venture was involved.

In looking at existing legislation for models that might be followed, we found the premerger notification requirement in the Hart-Scott-Rodino Act. That law requires certain corporations who are about to merge to notify the Justice Department and the Federal Trade Commission. Those agencies then have 30 days in which they may either clear the merger or deny permission for the merger or request further information.

Parenthetically, I would say that Mr. Myrick of the semiconductor industry in the previous panel had raised the possibility that action by the Government, if the Government does not take action within a prescribed period, be construed as an affirmative decision. That is the precedent that has been established in the Hart-Scott-Rodino Act.

If additional information is requested by the Government agencies, under this other legislation, then the merger is postponed until 30 days after the Government has received the new data. The Government, thus, is subject to very strict time limits, and yet the corporations are also encouraged to have everything in order when the come in.

A similar regulatory approach to proposed joint ventures would provide businesses with the quick prior approval they need.

Now we have the following suggestions for improvements to H.R. 1952:

First, we believe the bill's requirement that firms shall participate on comparable terms is good. However, we feel the legislation should be clearer on the point that firms entering the venture need not do so on identical terms. For example, while one partner may contribute money to a venture, another could provide materials or facilities while a third might loan employees for the project.

Similarly, we feel the bill's definition of a participant might be expanded to allow academic institutions or other nonprofit organizations to become partners in joint research ventures.

Second, the idea of requiring outside directors on a ventures management board, we feel is good as it helps represent the broader public interests. We would go further and suggest that the board be required to file periodic statements attesting that the venture is adhering to antitrust guidelines and the original proposal.

As the legislation stands now, the only means for review after a venture is launched would be through litigation or some criminal investigation.

I note that Mr. Price a few moments ago had raised some concerns about the rigidity that is created by a single certificate that would govern the venture forever. This periodic review may provide a mechanism for dealing with that problem.

Third, we question the wisdom of the self-certification process that would be available to some joint ventures under the legislation. We feel that all joint ventures should be subject to prior review by the Government as they are seeking shelter from public laws.

Finally, we do not like the bill's provision that participants may be rewarded in proportion to their participation. We believe all participants should have equal access to all benefits of the venture's activities. In research, the breakthrough could come in an inspiration provided by the smallest participant, just as well as by the largest.

Mr. Chairman, the suggestions we make are intended to further enhance what we regard as a basically good piece of legislation. The National Coalition for Science and Technology believes that joint research ventures are a practical solution to a serious problem and these new ventures should be encouraged.

We urge the committee to approve H.R. 1952 or comparable legislation.

[The biographical sketch and the prepared statement of Ms. Kurlat follow:]

Biographical Sketch

Ms. Gitta M. Kurlat is a practicing attorney in Boston. She is presently a director and vice-president of Eikonix Corporation and a former trustee of Tufts New England Medical Center. She recently served as vice-president of the Massachusetts Bar Association. Atty. Kurlat maintains an active interest in high technology business and its relationship to the scientific community.

NATIONAL COALITION FOR SCIENCE AND TECHNOLOGY
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Testimony of

GITTA KURLAT

Representing the
National Coalition for Science and Technology

Before the
Subcommittee on Science, Research and Technology
House Committee on Science and Technology

Washington, D.C.
July 12, 1983

Mr. Chairman, my name is Gitta Kurlat. I am the ~~vice president~~ secretary and a director of the Eikonix Corp., a small high-technology company in Bedford, Mass. I also am a partner in the law firm of Guterman, Horwitz, Rubin & Rudman.

Today, I am testifying on behalf of the National Coalition for Science and Technology (NCST) on whose advisory board I serve. The statement I am presenting has been prepared in consultation with a task force of the Coalition's advisors, and these individuals are identified in an appendix to my testimony.

NCST is an organization of scientists, educators, businesspeople and engineers who are deeply concerned about the state of science education and research, and industrial productivity in America. NCST's membership includes individuals, corporations and professional societies cutting across the spectrum of science and technology.

In general, we support amending the antitrust laws to facilitate joint research ventures. However, we would like to suggest some modifications to the pending legislation. Before making specific comments on HR1952 and similar bills, I would like to explain why we believe joint research ventures are important and why we support new legislation.

Mr. Chairman, our society has moved rapidly into an era of high-technology industries. Microelectronics and computers come most readily to mind, but we can look also at biotechnology, aerospace, energy and other fields. In all of these areas, there is a dramatic increase in research expenses as we move from one level of technological development to the next. Furthermore, we must recognize that technological advances are increasingly dependent upon progress in basic science. In these new, high-technology industries, there is a very fast transfer from basic research to applied technology.

Our nation's traditional approach to R&D, that of numerous companies pursuing parallel research programs, may not be adequate to meet the research requirements of these new technologies. First, there is the simple fact that as the cost of the research rises steeply, the number of companies who are capable of making such

investments drops rather quickly. Second, there is only a limited number of researchers trained to conduct advanced research in certain sophisticated technologies. Finally, we have to look at what our foreign competitors are doing.

In many instances, we find American companies that are relatively large within their respective industries competing against foreign companies that are affiliated with much larger conglomerate-type organizations. Moreover, some foreign governments encourage their private industry to pool research resources.

So, there is a growing imbalance between the resources U.S. companies are able to devote to specific research projects and what their foreign competitors are able to do. Even domestically, there is a growing disparity between the research capabilities of our very largest corporations versus those of even the second or third tier companies. Smaller businesses already are being priced out of basic research in some technologies.

Joint research ventures make sense. They allow firms to share costs and pool resources for R&D projects that are bigger and more complex than they could undertake individually. They help make more efficient use of limited resources, and they help offset the effects of differences in corporate size and resources.

We already have some examples of joint research ventures in the United States. This Committee has already heard testimony about the new Microelectronics and Computer Technology Corporation (MCC) and the Semiconductor Research Cooperative. You also are familiar with the various joint ventures that have been proposed for the development of new energy technologies. These are the exceptions, though; not the rule.

A number of legal questions remain. Some large companies, with a great deal of legal talent available to them, have gone ahead and risked establishing joint research ventures. Although the Justice Department has given its blessing to MCC, for example, that venture already has been threatened by civil litigation. Smaller companies, who do not have such extensive legal resources, are understandably reluctant to expose themselves to lengthy and expensive antitrust litigation.

The key legal factor encouraging joint research ventures lately has been the Reagan administration's perceived lenient attitude toward the antitrust laws. Personally, I would be very reluctant to advise a client to make a major long-term investment based upon the discretionary and reversible opinions of political appointees. That is a very risky proposition.

Before we can expect to see more companies, especially smaller-sized firms, investing in joint research ventures, there must be a clearly-defined set of guidelines as to what is allowable under the antitrust laws. And there must be a reasonable assurance against litigation if those standards are met.

We believe there are valid reasons why the government should be concerned about the potential for antitrust problems growing out of joint ventures. Those problems can be avoided, and the public's interest protected, if legislation like that proposed by Congressman Synar and Senator Mathias (HR 1952/S 737) or by Senator Tsongas (S 568) is adopted.

Mr. Chairman, the following describes the general principles the National Coalition for Science and Technology believes should be applied in evaluating proposed legislation to amend the antitrust laws affecting joint research ventures. Based upon these principles, we do recommend some changes be made in HR 1952, the bill which is before this subcommittee.

The National Coalition for Science and Technology believes that any legislation amending the federal antitrust laws to facilitate joint research ventures should incorporate all of the following points.

* Strictly limit the joint venture to R&D only; no manufacturing or marketing of products.
* Allow flexibility in structuring contribution requirements, to encourage participation by smaller firms.
* Assure all participants of a venture equal access to research results.
* Require prior review of the proposed venture by government officials.
* Require expeditious handling of any request for government review.
* Preserve the right to bring civil action under the antitrust laws, but limit liability to simple damages if a sanctioned joint venture is involved.

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In looking at existing legislation for models that might be followed, we found the pre-merger notofication requirement in the Hart-Scott-Rodino Act. That law requires certain corporations who are about to merge to notify the Justice Department and the Federal Trade Commission. Those agencies then have 30 days in which they may either clear the merger or request further information.

If additional information is requested, the merger is postponed until 30 days after the government has received the new data. The government thus is subject to strict time limits, yet the corporations also are encouraged to have everything in order when they come in.

A similar regulatory approach to proposed joint ventures would provide businesses with the quick prior approval they need. Once the government has certified that the proposal meets the necessary standards, then the companies involved are entitled to relief from the threat of triple-damages suits.

Applying these principles to the Synar/Mathias legislation pending before this Subcommittee, we have the following suggestions for improving HR 1952.

First, we believe the bill's requirement that participating firms shall participate on comparable terms is good and reflects our desire to see equity amongst the partners. However, we feel the legislation should be clearer on the point that firms entering the venture need not do so on identical terms. For example, while one firm may contribute money to a venture, another could provide materials or facilities, while a third might loan some employees to the project.

Similarly, we feel the bill's definition of a participant should be expanded to allow academic institutions and other non-profit organizations to be partners in joint research ventures. A further melding of basic research done on campuses and the applied technology approach of industry is inevitable in the frontier areas of high technology.

Second, the idea of requiring "outside directors" on the venture's management board is good, as it helps represent the broader public interest. We would go further and suggest that the board be required to file periodic statements attesting that the venture is adhering to the antitrust guidelines and its original proposal. As the legis-

lation stands now, the only means for review after a venture is launched would be through litigation or criminal investigation.

Third, we question the wisdom of the self-certification process that would be available to some joint ventures. We feel that all joint research ventures, regardless of who their participants may be, should be subject to prior review by the government, as they are seeking shelter from public laws. Moreover, it is difficult to define with precision who has what share of rapidly changing international markets for new technologies.

Fourth, we applaud the bill's feature requiring licensing of new technologies after a period of time. There is a gray area in the bill, though. As it is now written, HR 1952 requires public licensing within three years after participating firms have licensed an invention. Our question is: what happens to those inventions which the participating firms choose not to license themselves?

Fifth, we do not like the bill's provision that participants may be rewarded in proportion to their participation. We believe all participants should have equal access to all benefits of the venture's activities. In research, the breakthrough could come in an inspiration provided by the smallest participant as well as the largest.

Mr. Chairman, the suggestions we have made are intended to further enhance what we regard as a basically good piece of legislation. The National Coalition for Science and Technology believes that joint research ventures are a practical solution to a serious problem and they should be encouraged. We urge the committee to approve HR 1952 or comparable legislation.

Appendix

The following members of NCST's Board of Advisors served on the ad hoc task force on antitrust laws affecting joint research ventures. Affiliations are listed for the purposes of identification only.

Samuel Cardon- pres., General Technical Services, Inc.; pres. American Association of Small Research Companies.
Gitta Kurlat- practicing attorney; v.p., Eikonix Corp.; former v.p., Mass. Bar Association.
Carl Modecki- executive v.p., Consumer Bankers Association.
Arthur Obermayer- pres. and chair., Moleculon Research Corp.; member, National Advisory Council, Senate Small Business Committee; Chair., NE Section, American Chemical Society.
Warren Rudman- U.S. Senator(R-NH); chair., Subcommittee on Innovation and Technology.
Adlai Stevenson, III- practicing attorney; former chair., Senate Subcommittee on Science.
Mitzi Wertheim- mgr., Strategic Services, IBM; former deputy undersecretary of the Navy.
Linda Wilson- assoc. v. chancellor for research, U. of Illinois, Urbana-Champaign.

Mr. WALGREN. Thank you very much, Mr. Rosenberg.
Let's go right to Mr. Spillane.

STATEMENT OF PAUL SPILLANE, VICE PRESIDENT, SPERRY CORP. (AMERICAN ELECTRONICS ASSOCIATION), ACCOMPANIED BY RICHARD SCHWARTZ, ASSOCIATE GENERAL COUNSEL, SPERRY CORP.

Mr. SPILLANE. Mr. Chairman, my name is Paul Spillane and I am vice president of manufacturing and technology for Sperry Corp. With me today is Richard Schwartz of our general counsel's office.

Sperry is a diversified, high-technology company in the business of developing, manufacturing and selling information-processing systems and services, defense and aerospace systems, specialized farm machinery and fluid power equipment. The markets we serve are among the largest in the world.

I am appearing here today on behalf of the American Electronics Association. AEA represents 2,100 member companies nationwide and over 400 financial, legal and accounting organizations which participate as associate members.

AEA encompasses all segments of the electronics industry, including manufacturers and suppliers of computers and peripherals, telecommunications equipment, defense systems, and products, instruments, semiconductors and other components, software research and office systems. AEA companies account for 63 percent of the worldwide sales of the U.S.-based electronic industry.

At this point, Mr. Chairman, I would like to depart from the prepared remarks and go to a very brief summary which really highlights the balance of the prepared text. I would like to insure that the total text is submitted for the record.

Mr. WALGREN. That will be done.

Mr. SPILLANE. In looking at the balance of the prepared text, I have come up with really six key points which I think are important to be made at this point in time. I will go through these numerically and try to elaborate just a bit on them.

The first point that I would like to make is that the United States is losing its historic leadership in the development of new technologies. This has frightening implications for the U.S. in the areas of defense, industry, science and education.

Point two: A major deterrent to a concerted U.S. effort in world-class technology is the climate created by the U.S. antitrust laws. Elaborating just a moment on that particular aspect, I would like to point out that I feel very strongly that the existing antitrust laws contribute significantly to redundant and wasteful technological efforts by the various companies in our industry.

By joining together, we are able to accomplish much more in less time, conserving dollars and manpower, that can be directed to solving the next series of major challenges and thus allow us to remain competitive in the international business place.

The cost of technology is increasing dramatically and has been over the last several years. Let me just give you a couple of examples of cost of technology. There are some folks here, I am sure, that can speak more expertly in this area, but from our experience, just talking about a thin film head, which is used in a mass storage

device, we have estimated that over the past several years, we have spent considerable sums of money, but in order to complete that development, and this a very small device, would cost us $100 million.

That is including production facilities which are absolutely mandatory and necessary to complete the product. So for that kind of technology, we are talking about $100 million.

We talk about the cost of developing a major system in our business and that cost can run anywhere from $200 to $400 million. Significant amounts of money.

What we are seeing here is that there is a tremendous redundancy. There are 6 or 7 or 10 or 12 or 25 of us running after that same rainbow, the pot of gold at the end of that rainbow. We are all spending, perhaps not equal amounts of money, but certainly significant amounts of money, all heading in the same direction in virtually the same timeframe, and obviously this is redundant and wasteful from our perspective.

We do think that the aspect of the antitrust, the considerations that we are here today for, can help to remedy that situation.

I think it is also important to recognize that we talk about the cost of this R&D; we talk about the schedules; and we talk about the available technical resources to carry on this thing, that this aspect of shared or cooperative R&D has really got to be a way of life in the future for many of our companies.

We would expect that the ability to do it alone will be available only to the very, very rich.

Let me move on to point No. 3. Despite economic incentives for technological cooperation, the fear of antitrust litigation deters it.

Point No. 4. Antitrust laws act as a deterrent primarily because of their ambiguity. It was mentioned earlier by a previous speaker that the former San Francisco mayor, Joseph Alioto's letter to MCC shareholders declaring MCC to be illegal.

Point No. 5. We need new legislation which protects joint research participants from the threat of litigation, especially treble damages.

Point No. 6, and the last point that I have to make, H.R. 1952 and H.R. 3393 would both accomplish the objectives that we are seeking. We applaud and welcome both of them. We hope that the committee acts favorably.

Thank you, Mr. Chairman.

[The biographical sketch and the prepared statement of Mr. Spillane and the biographical sketch of Mr. Schwartz follow:]

SPERRY

BIOGRAPHICAL INFORMATION

PAUL J. SPILLANE

Vice President -- Manufacturing and Technology

Sperry Corporation

Paul J. Spillane was elected vice president--manufacturing and technology in January 1983. In this position, Mr. Spillane is responsible for ensuring that Sperry is a cost-effective producer throughout the world. Special emphasis is placed on productivity and factory automation. He coordinates the electronics technologies efforts of Sperry's business units, and is responsible for the corporate research center in Sudbury, Massachusetts.

Mr. Spillane joined Sperry in 1956 and served in several manufacturing positions at company locations in Minnesota and Blue Bell. In 1974, he was named group vice president of worldwide development and manufacturing. He held that post until 1978, when he was named product division president for Sperry's Computer Systems operations.

Mr. Spillane received a Bachelor of Arts degree in Economics from Bowdoin College, Brunswick, Maine, in 1952 and a Master of Engineering degree from Rensselaer Polytechnic Institute, Troy, New York, in 1956.

He and his wife live in Wayne, Pennsylvania. They have five children.

March 1983

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Statement of
Paul Spillane
Vice President, Manufacturing & Technology

before the

Subcommittee on Science, Research & Technology
Committee on Science & Technology
United States House of Representatives

July 12, 1983

Summary

- The United States today faces severe challenges to its technological leadership and international competitiveness. Meeting these challenges will require many actions. However, I believe that the single most important is a vast increase in technological cooperation, which H.R.1952 and H.R.3393 can help stimulate.

- The U.S. is suffering from a wasteful duplication of research and development efforts. For every corporation to rediscover what others have already learned is wasteful -- not only to each company -- but also to society. This is especially valid in light of our critical shortage of competent scientific and engineering talent.

- We thus have an environment which demands increased cooperation, but where many companies interested in cooperation are deterred by confusion and uncertainty.

- H.R.1952 and H.R.3393 does not change, but seeks to clarify, U.S. antitrust laws. Under its provisions, Congress would prescribe statutory criteria for lawfully organizing and conducting joint R&D ventures which, if met, would shield a venture from antitrust attack. Under this "self-certification" approach, a set of objective standards or rules would be enacted, and those companies desiring to cooperate in R&D could then plan and implement their activities accordingly.

- We also support provisions in related bills which limit anti-trust recovery in the R&D area to single damages, not treble; and which allow anti-trust defendants to recover attorneys' fees when they prevail.

AEA American Electronics Association
1612 K Street, N.W., Washington, D.C. 20006

STATEMENT OF PAUL SPILLANE
VICE PRESIDENT, MANUFACTURING AND TECHNOLOGY,
SPERRY CORPORATION

FOR THE AMERICAN ELECTRONICS ASSOCIATION
BEFORE THE SCIENCE, RESEARCH AND TECHNOLOGY SUBCOMMITTEE
JULY 12, 1983

Mr. Chairman and honorable representatives, my name is Paul Spillane and I am Vice President of Manufacturing and Technology for the Sperry Corporation. With me today is Richard Schwartz of our General Counsel's office.

Sperry is a diversified high-technology company in the business of developing, manufacturing and selling information processing systems and services, defense and aerospace systems, specialized farm machinery, and fluid power equipment. The markets we serve are among the largest in the world.

I am appearing here today on behalf of the American Electronics Association ("AEA"). AEA represents over 2,100 member companies nationwide, and over four hundred financial, legal and accounting organizations which

PARTICIPATE AS ASSOCIATE MEMBERS. AEA ENCOMPASSES ALL SEGMENTS OF THE ELECTRONICS INDUSTRIES INCLUDING MANUFACTURERS AND SUPPLIERS OF COMPUTERS AND PERIPHERIALS, TELECOMMUNICATIONS EQUIPMENT, DEFENSE SYSTEMS AND PRODUCTS, INSTRUMENTS, SEMICONDUCTORS AND OTHER COMPONENTS, SOFTWARE, RESEARCH, AND OFFICE SYSTEMS. AEA COMPANIES ACCOUNT FOR 63% OF THE WORLDWIDE SALES OF THE U.S. BASED ELECTRONICS INDUSTRY.

IN RECENT YEARS CONGRESS HAS INDICATED AN INCREASING AWARENESS OF THE FACT THAT THE UNITED STATES IS LOSING ITS HISTORIC LEADERSHIP IN THE DEVELOPMENT OF NEW TECHNOLOGIES. PROGRAMS ORGANIZED AND PARTIALLY FUNDED BY SEVERAL FOREIGN COUNTRIES AND INVOLVING INTEGRATED COOPERATIVE EFFORTS AMONG INDUSTRIAL LABORATORIES, UNIVERSITIES AND GOVERNMENT AGENCIES MAY ULTIMATELY RESULT IN U.S. DEPENDENCE ON FOREIGN SOURCES FOR ACCESS TO THE MANY ESSENTIAL NEW DEVELOPMENTS. THE POSSIBILITY OF GRAVE DAMAGE TO U.S. DEFENSE, INDUSTRY, SCIENCE, AND EDUCATION IS FRIGHTENING.

DESPITE THE HIGH STAKES FOR THE NATIONS ECONOMY AND DEFENSE, INDIVIDUAL FINANCIAL CONSIDERATIONS AND OTHER DISINCENTIVES HAVE DISCOURAGED A BROAD PRIVATE SECTOR PUSH IN MANY AREAS. THE MARKET IS LIMITED AND TECHNOLOGY SO COMPLEX THAT MOST DOMESTIC COMPUTER COMPANIES CONSIDER THE POTENTIAL RETURN ON ENGINEERING AND R&D DOLLARS AND TALENT TO BE INSUFFICIENT.

CHIEF AMONG THE DETERRENTS TO A CONCERTED U.S. EFFORT IN THIS AND OTHER AREAS OF "CUTTING EDGE" TECHNOLOGY IS THE CLIMATE ENGENDERED BY THE U.S. ANTITRUST LAWS. ECONOMIC CONSIDERATIONS, INCLUDING A CRITICAL SCARCITY OF SKILLED TALENT, PROPEL US TOWARD TECHNOLOGICAL COOPERATION. BUT, THE FEAR OF COSTLY ANTITRUST LITIGATION MAKES POTENTIAL PARTICIPANTS LEERY OF JOINING FORCES IN THE LABORATORY.

DRAWING ON SPERRY'S EXPERIENCE AS A FOUNDING MEMBER OF A RECENTLY-FORMED JOINT R&D VENTURE WHICH HAS ATTRACTED WIDESPREAD PUBLICITY, I WILL ADDRESS MYSELF FIRST TO THE FACTORS WHICH ENCOURAGE US TO ENTER INTO SUCH COOPERATIVE PROJECTS.

Sperry's participation in the Microelectronics and Computer Technology Corporation (MCC) is consistent with a rapidly developing trend throughout the electronics industry for technology sharing. Such arrangements leveraging R&D resources have become an economic necessity, particularly with the ever increasing involvement of foreign governments in the private business sector.

MCC's four projects which address advanced architecture concepts, semiconductor design and packaging, CAD/CAM and software technology complement Sperry's own ideas. The opportunity to avoid wasteful duplication of R&D efforts by cooperating in the development of fundamental technologies serves Sperry's self-interest, the interest of the electronics industry, and most importantly, the interest of the United States in remaining a premier technological power. For Sperry, as for the other participants in MCC, the knowledge that cooperation will spur innovation efficiently, without compromising our competitive position, provided overwhelming incentive to join together in this venture.

However, discouraging any potential joint-venture participants from contemplating similar productive efforts is the shadow cast by our antitrust laws. It is a shadow made darker by ambiguity and uncertainty. No one has yet

SUGGESTED THAT JOINT R&D VENTURES ARE INHERENTLY UNLAWFUL. NOR, TO MY KNOWLEDGE, HAS ANY JOINT RESEARCH VENTURE BEEN SUCCESSFULLY PROSECUTED FOR VIOLATING THE ANTITRUST STATUTES.

BUT, THE LAW LEAVES THE ISSUE SUFFICIENTLY UNSETTLED THAT A DISTINGUISHED SAN FRANCISCO ATTORNEY, FORMER MAYOR JOSEPH ALIOTO, HAS DECLARED IN LETTERS ADDRESSED TO EACH MCC SHAREHOLDER THAT MCC IS ILLEGAL. TO A BUSINESSPERSON CONSIDERING THE POSSIBILITY OF A LAWSUIT FOR TREBLE DAMAGES, THE PROSPECT OF YEARS OF LITIGATION EXPENSE IS ENOUGH TO MAKE HIM SKEPTICAL OF SHARING IN THE TECHNOLOGICAL SPADE WORK.

THE IMPEDIMENT, THEREFORE, TO THE FORMATION OF JOINT RESEARCH VENTURES IS NOT SO MUCH IN WHAT THE LAW SAYS AS IN WHAT IS LEFT CLOUDY -- LEFT TO THE BUSINESSPERSON'S IMAGINATION. LEGISLATION WHCH DISPELS THE CLOUDS; WHICH PROTECTS JOINT RESEARCH PARTICIPANTS FROM THE THREAT OF TREBLE DAMAGES AND FROM THE THREAT OF ENDLESS, COSTLY LITIGATION WILL PERMIT THE BUSINESSPERSON TO MAKE HIS CALCULATIONS FREE OF THE TIMIDITY NOW INDUCED BY ANTITRUST CONSIDERATIONS.

MR. CHAIRMAN, H.R. 1952, INTRODUCED BY REPRESENTATIVES SYNAR, WYDEN, ZSCHAU AND GEPHARDT; AND H.R. 3393, INTRODUCED BY REPRESENTATIVES SENSENBRENNER AND LLOYD, WOULD BOTH ACHIEVE THE DESIRED OBJECTIVE.

Both bills protect joint research ventures from antitrust liability if specified criteria are met. Both provide for a "self-certification' mechanism under which the venture simply notifies the Attorney General of its formation. H.R. 3393 grants a welcome added measure of protection by limiting antitrust damages to actual damages. Both bills deter plaintiffs from pursuing litigation for its nuisance value by requiring losing plaintiffs to pay the defendant's legal fees.

The bills seem to differ principally in their definition of "relevant market." Both seek a mechanism which would prevent a joint venture from becoming anticompetitive in the classical sense of a monopoly. Neither, in our view, achieves this reasonable objective cleanly and effectively. Of the two, we prefer the approach of H.R. 3393 because it limits antitrust claims against R&D joint venutures to single damages. However, H.R. 1952 has a preferable market share limitation. Defining a "market" is not easy and many joint venture participants may be claimed to have 25 percent of a relevant market. Fifty percent in the aggregate for all participants with one participant having over 25 percent of the market is more workable as a trigger for requiring a Justice Department waiver. Lawyers can create the most remarkable markets.

In summary, Mr. Chairman, we applaud this Committee's interest in an issue of great importance to the technological competitiveness of the nation. We are delighted that you have before you two excellent bills which would remove the cloud of fear and uncertainty over the business community's interest in technological cooperation. These are bills that would allow companies to <u>enhance</u> their competitiveness in the application of research vis a vis each other and would also enhance the overall technological excellence of the United States. We urge you and your colleagues to act favorably on this legislation.

Thank you.

SPERRY

BIOGRAPHICAL INFORMATION

RICHARD SCHWARTZ

Associate General Counsel

Sperry Corporation

Richard Schwartz joined the law department of Sperry Corporation in 1970 and was appointed associate general counsel in 1983. He is primarily responsible for corporate antitrust, financing and securities matters.

Additional responsibilities have included acquisitions, export controls, intellectual property licenses, incentive compensation and stock option plans.

Before joining Sperry, Mr. Schwartz was with General Electric Company. From 1960 to 1963, he was an Assistant Attorney General of the State of New York.

He was graduated from Harvard College in 1954 and Columbia Law School in 1959.

Mr. Schwartz is an assistant editor of the International Lawyer, author of Are The OECD and UNCTAD Codes Legally Binding? and The Anti-Foreign Compulsion Act and an editor of Current Legal Aspects of Doing Business in the European Economic Community.

His memberships include the Association of the Bar of the City of New York where he has been Chairman of the Electrical and Business Equipment Group, Committee on Corporate Law Departments (1967-1969), the Section of International Law and Practice of the American Bar Association where he has been Vice Chairman of the Committee on International Aspects of Antitrust Law (1976-1980), the Japan Society (New York), the Japanese-American Society for Legal Studies, and the Columbia Law School Symposium Planning Committee.

Mr. Schwartz served in the Air Force from 1955 to 1957 attaining the rank of First Lieutenant.

Mr. WALGREN. Thank you very much, Mr. Spillane.

Mr. Mineta.

Mr. MINETA. Let me just ask about one part of it. With regard to the 10- or 15-year time limit for acceptable ventures, what would you consider to be a reasonable time period? One bill, I believe, has 10 years and another has 15 years.

Has there been much thought given to that?

Mr. ROSENBERG. Just briefly, if I might respond, we reviewed all of the pending bills and we were puzzled by that. It seems to us, particularly in the basic research area, that it is rather difficult to speculate at the outset.

Mr. MINETA. Is there any reason to have a limitation?

Mr. PRICE. That is only, I think, in view of trying to fit this within the current framework of antitrust legislation, which does require a time period. Whether it is 10 or 15 years is relatively unimportant, but by putting a time-frame of some kind, but sufficiently long to let you engage in meaningful research projects was the only reason it was there.

Do it in the context of present law, but put something that would be appropriate to research and development ventures. So 10 or 15 is unimportant. Anything longer than 8 or 9 or 10 would be fine. I do not know that other than just trying to comform as much as possible with the tenor of current law, that there needs to be a time period.

Mr. ROSENBERG. We would like to suggest that if there is a specific time limit to a joint venture that there be some mechanism provided for a renewal because we would hate to see a project get 90 percent completed and then at the 10th anniversary, everything has to be disbanded.

Mr. MINETA. Was it your testimony, Mr. Price, that welcomed the outsider on the Venture Management Board?

Mr. PRICE. Yes, that is a part of H.R. 1952 which we—which I guess Mr. Rosenberg and myself both supported.

Mr. MINETA. Thank you very, very much.

Mr. WALGREN. Thank you, Mr. Mineta.

Mr. MacKay.

Mr. MACKAY. Is there any policy reason why the law should not require that a joint venture be open to all firms who wanted to participate? Would not that requirement effectively resolve the antitrust implications?

Mr. PRICE. That would certainly—well, the antitrust law is a double-edged sword, or a Catch-22, whichever way you want to look at it in many regards. One of them is the point you just raised: It must be open to all concerned. So they should do that. Of course, you get into this horrible market share discussion.

But, yes, I believe, H.R. 1952 does state that it is open to all U.S. firms as a requirement. That does go a long way toward mitigating antitrust concerns, that is right.

Mr. MACKAY. All right.

I do not have any other questions, Mr. Chairman.

Mr. WALGREN. How, if it is open to all concerns, then how do they get a market share limit on that? Maybe I am not understanding properly. I guess I am not understanding properly.

Mr. MACKAY. Subject to the market share limit, I guess.

Mr. WALGREN. Yes.

Mr. PRICE. Yes.

Mr. ROSENBERG. We had an element in our prepared testimony, Mr. Chairman, which I did not read, and that was simply that we question the ability to accurately measure market share in some of these new technologies, particularly if we are looking at basic research into a technology that is not on the market yet.

So we think there are some real problems with the market share approach to begin with.

Mr. MACKAY. Mr. Chairman.

Mr. WALGREN. Mr. MacKay.

Mr. MACKAY. I am not sure I understand that it is a very relevant concept as applied here. I am still trying to deal with that old issue.

Mr. ROSENBERG. I think we are dealing with a holdover from existing antitrust standards.

Mr. PRICE. Yes, that is exactly it.

Mr. WALGREN. Well, no comment.

Mr. MACKAY. If everybody can get in, then what difference does it make?

Mr. PRICE. Well, there is a concern, of course, and that was stated, I believe, by one of the members of the previous panel, that if every member of an industry participates, they will not, in fact, engage then in competitive or additional R&D on their own.

One can debate that point, but rather than debate at ad infinitum as to whether that is true or not true, which is a matter more of philosophy than it is anything else, the market share limitation—some reasonable market share limitation as a pragmatic matter of getting a piece of legislation, may be an important factor. That is—it cannot be stated any simpler than that.

You are not to really hurt the intent of the legislation by putting in a reasonable market share limitation—I mean, not something trivial. Five percent, obviously, is crazy. But 30, 40, 50 percent, it is large enough that it would not be a practical limitation to encouraging cooperative R&D.

Mr. MACKAY. I am just trying to think up some kind of real-world hypothetical. Suppose that a company had had a very good young scientist on its payroll for a number of years doing basic research. Suppose that he suddenly quit that company and went into a joint venture with their main competitor in which he put up himself and they put up the capital and that company was not free to participate.

Would that not have somehow done violence to people's sense of basic fairness?

Mr. PRICE. Well, that—I am not sure of that one. If somebody wants to quit these days, they quit fairly regularly and go into business for themselves, whether it is with somebody or not with somebody.

Mr. MACKAY. That is not a triple damages, treble damages problem.

Mr. PRICE. No, unless they happen to steal something, and that is a different kind of lawsuit.

Mr. MACKAY. OK, all right.

Mr. WALGREN. I wanted to ask Mr. Price this. This concept of remaining fluid and being able to move, apparently within some representations, and yet does that not run into any tight limits that we put on the activities that are to be engaged in?

Mr. PRICE. I do not believe so, Mr. Chairman. The point is, if we set some reasonable standards—look, we have got nothing now. Almost anything we do is going to be a step forward. We set some reasonable standards—the best we can come up with, with everybody's collective intelligence today, whatever that is—I can almost guarantee you that if those are anywhere near reasonable, there will be literally tens of thousands, hundreds of thousands, millions of research and development projects that can be fit within those guidelines.

So what it means is that a venture would have the opportunity to start and stop research projects and take off in new directions and not have to go back on every one of those and get recertified because it would be working within, still within this basic set of standards that we set, but certification involves looking at a specific project and saying, yes, that project is OK.

Well, if you stop that project or start it, then you have got to go say, yes, this variation is OK. So what it really is is a copout from not going through the hard debate right now of saying what reasonable standards can be and setting that as a matter of public policy.

Mr. WALGREN. I get confused in my mind between standards and disclosure. On the one hand, the question seems to me—or one question that I have is, What standards do we set and then what are we asking be disclosed? What is our purpose in disclosure?

Is there a problem of depth of disclosure or what are we—what do we seek to accomplish by disclosure, just the fact that something is going on? Is that the only interest of the rest of the industry to know, or do they have an interest in knowing what is going on?

Mr. PRICE. As far as disclosure is concerned, the purpose of disclosure is to provide enough information, a reasonable amount of information to show that you are continuing to operate within the standards. The provisions of the legislation, at least as I understand it, do provide that at any time, if the Attorney General feels that you are not disclosing enough for public purposes, that they can go and require you to disclose more.

Mr. WALGREN. So the degree of disclosure really is driven by whatever these standards are?

Mr. PRICE. Yes.

Mr. WALGREN. When you set your standards, that is where you define what levels of disclosure you are interested in.

Mr. PRICE. Right.

Mr. ROSENBERG. Mr. Chairman, it also provides an element in the relief from litigation because it then tells the other potential litigant what it is that you have gotten permission to do, and therefore, he cannot sue you for it.

Mr. PRICE. Right, and it eliminates the conspiracy part of it that is a part of antitrust suits.

Mr. WALGREN. All right. What are the most important standards—could you tick down through them with me—that you feel

we have to be assured that an enterprise in this area would be meeting?

Mr. PRICE. The first, of course, is that it be a research and development venture, and the definition, then, of research and development, and again, that is why the definitions as understood have to be fairly clear. I think one of the previous panelists discussed that as well. I noticed that, in both bills, there is a definition of the term research and development, which I believe, as you were discussing, can be very fuzzy.

The first thing is to define the thing, and that it be limited to that definition of research and development. So that is the touchstone, that is the foundation that everything proceeds from, and I believe, as Mr. Spillane said, that specifically excludes manufacturing and marketing and other kinds of activities which could be undertaken within the thing.

There are a couple of very important other points which may not jump out immediately, and that is that by forming the venture, there cannot be any constraint at all on any of its members' ability to conduct its own R&D, even if it wants to duplicate what is going on in the joint venture or it wants to do anything whatsoever with it. That, then, leaves freedom of action. In other words, the participants are not agreeing to restrain their activities in any way.

Then there is the opportunity—the second point is that they can use the technology in any way they see fit. That is to say, they take it, they do what they want to with it, as opposed to some kind of research consortium that would say, OK, you can have it, but you can only build widgetts instead of wodgetts with it. You cannot go into this area of business, or you agree not to use this technology to do watches instead of computers or any kind of constraints like that.

In other words, every member can do whatever they see fit with it.

Then this matter—from a public policy point of view, this matter of agreement to license after a reasonable period. Here you have a question of fairness, of equity. On the one hand, the people who take the risk deserve some consideration for having taken the risk, some access to the technclogy for a period of time. On the other hand, if the purpose of joint research and development is a general economic stimulus, then making the technology widely available after some reasonable period is an important balancing act as well.

Whether 3 years is exactly the right term—you know, whether it is 30 months—nobody knows for sure, but a lot of discussion and debate over a long period of time says that in particular for small companies, that that is a way to give them an opportunity to get at the research of larger organizations, including joint ventures—and it is a bit of a quid pro quo, I guess, is another way of putting that. So that is an extremely important point.

Let's see if I—well, the public awareness thing is also a key point that we were just discussing. So you are not off in a closet; everybody knows what you are doing. That has a lot of beneficial effects.

Mr. WALGREN. Well, OK. I think I have satisfied myself on that.

Anything further, Buddy?

Mr. MACKAY. Mr. Chairman, I was just sort of hurriedly trying to review both of these pieces of legislation for the provisions that

we are calling standards. I can identify some of them. I would like to ask the gentlemen who are still here from both of these last panels if they would care to submit anything further in specific comments regarding standards and definitions of research. To me, that definition is not clear at all.

In fact, it just sort of says research, and it is supposed to be a self-defining term. It does not even say not including manufacturing, as I see it. I would like—it seems to me for us to move forward, if we really are the forum, that is a point we ought to ask these gentlemen to zero in on. They are the strong proponents of the legislation and perhaps can really think it through and give us something.

The idea is, I think all of us want to protect the public, but not put in so much overkill that you are back next year saying, let me tell you why it would not work. That might be a very helpful thing.

Mr. WALGREN. Thank you very much and that concludes the hearing.

[Whereupon, at 12:20 p.m., the subcommittee was adjourned, to reconvene subject to the call of the Chair.]

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APPENDIXES

APPENDIX I

National Association
of Manufacturers

JAMES P. CARTY
Vice President and Manager
Government Regulation and Competition

July 15, 1983

The Honorable Doug Walgren
Chairman
Subcommittee on Science, Research
& Technology
U. S. House of Representatives
2441 Rayburn House Office Bldg.
Washington, DC 20515

Dear Mr. Chairman:

The membership of the National Association of Manufacturers is vitally interested in the efforts of your subcommittee to process legislation which would facilitate and protect pro-competitive joint ventures among businesses. We are encouraged by your subcommittee's acknowledgment that cooperative efforts among businesses may be appropriate. The NAM wishes to assist you in the formulation of a legislative response which can preserve the integrity of our competitive enterprise system while fostering cooperative ventures.

Enclosed is a prepared statement outlining the NAM's initial response to the various legislative proposals already introduced and under consideration in this Congress relative to cooperative research and development. We would very much appreciate our statement being made a part of the hearing record on H.R. 1952, introduced by Congresman Synar (D-OK). We would expect that as this legislation and others continue to be processed, that we may submit supplementary remarks. If you require further information, please do not hesitate to contact me.

Sincerely,

Enc.

Statement of the

National Association of Manufacturers

on H.R. 1952

Submitted to the

Subcommittee on Science, Research & Technology

of the

Committee on Science and Technology

United States House of Representatives

July 15, 1983

Submitted by: James P. Carty
Vice President, Government Regulation and Competition Department

Howard A. Vine
Director, Corporate Finance, Management and Competition

The National Association of Manufacturers ("NAM") appreciates this opportunity to submit its views on legislation proposing to permit businesses to jointly perform research and development. A variety of proposals intending the same result are before Congress and this Committee, and the remarks contained herein address the provisions of H.R. 1952, the "Joint Research and Development Ventures Act of 1983" sponsored by Congressman Michael Synar (D-OK).

The NAM's membership is well situated to comment on legislation of this nature in that the primary focus of NAM's members' businesses is the research, development, manufacture and marketing of new processes and products. NAM's membership is composed of over 13,000 businesses which engage in the above-mentioned enterprises, and the resulting composition of our membership reflects over 80 percent of the products produced and 85 percent of workforce employed. NAM is further affiliated with an additional 158,000 businesses through joined representation with our National Industrial Council trade group.

A number of legislative proposals have been introduced in this Congress attempting to resolve a recently perceived and acknowledged problem - the need for United States companies to research, develop and market products competitive in a global marketplace and economy. Such a broadscale challenge, it is suggested, can not be met by the natural independent efforts of domestically competitive U.S. companies. Rather, it is becoming increasingly apparent

that the world marketplace dictates cooperative efforts; pooled economies, joint research, concerted cooperative development, and unitary strategies resulting from coalesced initiatives.

Achieving economic growth and long-term economic stability are two of our nation's primary goals. Essential to this progress is the introduction of new products and processes, which we develop through the innovation process.

Over the past decade, however, the rate of domestic economic growth has slowed and it has been suggested that the decline is due, at least in part, to American industry's "diminished propensity for innovation." A variety of explanations have been offered: burdens of environmental regulations, inflation, and antitrust policies and practices.

Specifically troubling in the antitrust field is the effect statutory policy may have on the ability and inclination of firms to join in R&D joint ventures.

The antitrust laws embodied in the Sherman Antitrust (Sec. 1) and the Clayton Acts (Sec. 7), proscribe forms of conduct that may be illegal restraints of trade or other anticompetitive practices. Language of the Sherman Act, preventing "contracts, combinations or conspiracies in restraint of trade" provides significant discretion both within the federal government and the private bar to challenge instances and forms of business that may merely provide an opportunity for such conduct to arise. In this

regard, the establishment of a joint venture has nearly all the elements of a violation to at least raise the specter of anticompetitive activity -- i.e., a contract; a combination; and the opportunity of the partners, competitors in business, to engage in collusion.

This near-legal presumption, likely under joint venture arrangements, is unfortunate. Joint ventures -- companies teaming up to achieve such goals as cracking a foreign market, laying a pipeline, or building a chemical plant -- have proved to be an increasingly popular way of sharing big risks, costs and potential rewards.

The joint venture form of business permits entry into an industry where:

o the absolute capital requirements are so high that only a few large firms would otherwise participate;

o the risks may be so great that only a few, if any, existing firms would be willing to participate on their own;

o separate operations by competing firms may be economically inefficient; and

o large investments may produce external economies that will accrue to all firms regardless of their participation in the initial enterprise.

Each of these reasons may come into play when firms seek to form the type of joint venture that is of the greatest relevance to technological innovation, a research joint venture. Nonetheless, joint ventures are not always viewed by the Department of Justice as net additions to

the competitive picture. The fact is that joint ventures, including those operating in a market separate from that of either parent company, are susceptible to anticompetitive abuse. They may serve as conduits through which the firms exchange price or other information in restraint of trade. They may represent a single new entrant in a market that each of the companies, separately, might naturally have entered independently.

Thus, there must legitimately remain not only a balancing of interests in this field but also a proper role for the antitrust laws and the Department of Justice's and FTC's enforcement of such laws.

Within the past five years, Congress and the administration have become sensitized to this anomaly of antitrust enforcement and innovation enhancement. Legislation has been introduced in both houses of Congress to inject greater balancing on the part of enforcement officials, together with procedural remedy and enforcement immunity proposals. Further, the Department of Justice has taken important steps toward outlining its enforcement intentions.

In 1980, the Department issued its Antitrust Guide Concerning Joint Research Ventures. Also published that year was Antitrust, Uncertainty, and Technical Innovation, a bulletin prepared by the National Academy of Sciences. The Department of Justice further has had the long-established practice of issuing enforcement advisory letters under its

"Business Review Procedure." In that process, a proposal to form a joint venture will be formally reviewed by authorities and a letter issued regarding present enforcement intentions of the agency.

With these current mechanisms in place, and Congress' continuing movement to give assurances of legitimate joint ventures, it seems ironic that between 1968 to 1978, only 29 inquiries on planned joint ventures had been filed under the Business Review Procedure. Of these, more than 90 percent were approved by the department. Even more curious is the fact that the limited challenges from the department did not spur a wave of new proposals. Authorities suggest that this limited number of new proposals may be due to three potential factors: participants willing to rely upon stated advice of counsel; a distrust of the formality and delay of the Business Review Procedure; or ambiguities of law and enforcement that are deterring people in the first instance.

Under the Business Review Procedure, a venture is not given absolute assurances that legal action will never occur. Rather, the participants who have outlined their proposed programs to the department are only assured that the project, if followed to the letter, is not likely to encounter an antitrust violation. This in no way suggests or guarantees immunity from prosecution. Any deviation from the approved proposal can result in a new enforcement approach. <u>There has never been, however, a prosecution after the issuance of a Business Review letter</u>.

The question on how material deviations must be before they are subjected to the wrath of prosecutors has never been settled. Even assuming some form of temporary immunity from federal criminal prosecution, the venture remains subject to a private civil treble damage action with the Review letter providing little evidentiary value. Thus, ambiguity and uncertainty may frustrate legitimate efforts to form constructive joint ventures immune from prosecution.

Another factor receiving attention as a deterrent is the complexity of a joint venture. Typical joint ventures involve the creation of a separate entity, either a corporation or a partnership. The participants contribute some combination of equity and expertise, and they borrow the rest of the project capital from banks and longer-term lenders. Usually, if the project fails, its financiers have recourse only to the assets of the venture equity. While this feature tends to limit legal liability, moral obligations to make good on the debts often entangle the promoters in messy relationships. One complication, for example, involves ascertaining the value of equity contributions that had no previous market value. Still another is the desire of lenders, in the event of default, to attach joint venturers' assets.

One major impediment to JRVs that must be overcome is the longstanding and inbred view (within business) that corporations are natural competitors and, as such, must

compete in every way. Therefore, any form of cooperation is arguably a sign of weakness that will end up harming the company. American businesses are so accustomed to competing against one another that they find it difficult to enter into a cooperative effort.

H.R. 1952 proposes a certification process with corresponding protections available to those wishing certainty and insulation from federal enforcement authorities. While the means for providing such assurances should and are likely to be debated at length, the objectives of Congress and the business community must be achieved. Too often, we fear, legitimate pro-competitive joint ventures may be foregone due to both the uncertain nature of federal enforcement and the reasonably anticipated extortionate tactics of a cottage industry of lawyers energized by awards of attorney's fees, class certification procedures and treble damages. Certification of the joint research and development form of business, when it is for purposes of shielding these potentially pro-competitive entities, is clearly a positive effort of this Congress to be encouraged by all Americans interested in the benefits of true competition. In this regard, we urge this Committee, and the Congress, to remain committed to doing all in its power to achieve and acknowledge the benefits of cooperative business/industry/university efforts.

Further, the NAM believes that limiting the focus of these hearings, whether by the Science and Technology or

Judiciary Committees, to the details of a certification process is incomplete. The problems and limits we now face in the joint R & D area, we believe, merely reflect the negative presumptions federal antitrust law has maintained. We urge this Committee, in concert with other Congressional panels, to call for a reassessment of our antitrust laws with the express purpose of providing a clearer understanding for the business community and the federal antitrust enforcement authorities as to the limits of proper joint research ventures.

The NAM's FTC/Antitrust Subcommittee recently reviewed this problem and resolved that:

WHEREAS, the subcommittee understands that the antitrust laws are perceived to be a hindrance to research and development joint ventures, especially, the provision that allows the awarding of treble damages. Although the Department of Justice has issued guides in this area, the chilling effect of potential criminal and civil actions has undercut this effort of the Department to provide some firm guidance.

RESOLVED, that the subcommittee encourage legislative changes that would bring more certainty to the effects of the antitrust laws upon research and development joint ventures, including immunity from civil and criminal action; clarification of the antitrust laws applicability to joint ventures, i.e. rule of reason approach, and reduced financial liability (actual damages) in civil cases.

The NAM appreciates this opportunity to outline the parameters of Congress' focus on joint research ventures and antitrust constraints. We stand ready to be of assistance to the Committee in its deliberations.

APPENDIX II

SIA SEMICONDUCTOR INDUSTRY ASSOCIATION
20380 Town Center Lane • Suite 155 • Cupertino, Ca 95014 • 408/255-3522 408/246-1181 Telex: 172 231 SIA CPTO

July 25, 1983

The Honorable Doug Walgren
Chairman, Subcommittee on Science, Research
and Technology
2441 Rayburn House Office Building
Washington, D.C. 20515

RE: R&D Joint Ventures

Dear Congressman Walgren:

In the testimony which I gave to the Subcommittee on Science, Research and Technology, during hearings on July 12, 1983, Congressman Gregg asked for legislative language to implement the structure which I described. I am pleased to transmit to you, and by copy of this letter to Congressman Gregg, such legislative language together with a brief summary thereof. I should also point out that in response to a request from Congressman MacKay, I have included a rather thorough definition of R&D for your Subcommittee's review.

If you should have any questions in regard to these matters, I shall be pleased to discuss them with you. I can be reached at (214) 466-6281.

Very truly yours,

Ronald E. Myrick
Chairman, Law Committee

REM:clw
Enclosure

cc: The Honorable Judd Gregg
The Honorable Buddy MacKay

Summary

The enclosed bill provides three distinct but interrelated categories of incentives for R&D joint ventures which by increasing the occurrence of such ventures, will foster innovation, productivity, and economic competitiveness in the United States.

1) MODIFICATION OF REMEDIES

The first category provides incentives generally for those engaging in R&D joint venture activity, as defined in Section 9: (A) the maximum liability under the antitrust laws would be adjusted to actual damages plus interest rather than treble damages (See Section 6.); (B) those engaging in R&D joint venture activity would be permitted when sued to show the reasonableness of their activity and therefore its legality without having such showing precluded by so-called per se rules (See Section 5.); and (C) a chilling effect on the formation of such ventures arising out of excessive exposure to unwarranted litigation would be diminished by evenhandedly awarding a reasonable attorneys fee to the prevailing party in the lawsuit, plaintiff or defendant (See Section 7.).

2) SAFE HARBOR

The second category of incentives is the provision of a "safe harbor" for those R&D joint ventures that are able to conform their

conduct to certain specified standards (See Section 3.). While such standards are not supplied in the enclosed draft, they are presently receiving substantial attention. However, their effect is clear: to protect any person conforming his conduct to the standards from antitrust liability. This "safe harbor" area will be somewhat narrower than the broader surrounding area of R&D joint venture activity treated in the first category.

It is important to note that it is not intended that the standards attempt to re-write or codify antitrust law in the R&D joint venture field. Conformity with the standards yields the protection described above. Non-conformity with the standards means merely that such protection is not thereby available but is not an indication of a violation. A plaintiff attempting to show wrongdoing by a R&D joint venture will have to show non-conformity with the "safe harbor" standards and that, just as today, the conduct in question violated the antitrust laws. (See Section 3(b).).

3) CLEARANCE

The third category of incentives, like the second, may protect persons engaging in R&D joint venture activity from antitrust liability. (See Section 4.). In contrast, to be protected under this category, the joint conduct - past, present, and future - must be disclosed to the Attorney General and,

with certain narrow exceptions, made public. While such disclosure protects the venture against criminal and monetary liability, any anticompetitive conduct is subject to attack at any time by either the Attorney General or any private party suing for injunctive relief. In such suit for injunctive relief, the plaintiff, as noted above, has the burden of showing that the parties to the venture were in violation of the antitrust laws and not within the safe harbor of section 3. Parties who made disclosure and engage only in conduct which they have disclosed are subject only to injunctive relief; however, parties to a venture who have not sought the protections of disclosure may be subject to criminal or monetary liability.

4) INVESTIGATORY AUTHORITY

Since the Attorney General is already armed with full authority to investigate antitrust violations, it is necessary only to augment his authority with respect to the new areas created by this legislation - the safe harbor provisions of section 3 and the disclosure provisions of section 4. Also in an attempt to diminish the possibility of lengthy and costly antitrust litigation, the Attorney General, if he believes he has a case against a R&D joint venture, must give notice of his concerns before bringing suit thereby possibly eliciting voluntary corrective action (See Section 8.).

A BILL

To modify the operation of Federal and State antitrust laws for the conducting of certain research and development activities jointly, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Research and Development Joint Venture Act of 1983".

SEC. 2. (a) The Congress finds the following:

(1) Research and development are major factors in the growth and productivity improvement of United States industry and of the national economy.

(2) Although innovations in some industries have resulted in impressive increases in productivity, the overall rate of growth in industrial productivity in the United States is decreasing.

(3) Growth in industrial productivity requires the strong support of research and development and the introduction of advanced concepts, processes, and industries.

(4) In order to maintain the international competitiveness of industries in the United States, it is necessary to facilitate an increase in private research and development.

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(5) Many firms are unable to undertake the levels of research and development necessary for the United States to remain competitive in global markets because of the capital intensive nature of research and development programs and the chronic shortage of trained scientific and engineering personnel.

(6) The expense and personnel requirements of carrying on a sufficiently broad spectrum of research and development programs is prohibitive for many businesses.

(7) A firm's or an industry's ability to commit capital to research and development ventures of potential national importance is often dependent upon such firms' or industries' being able to share the risks which projects often entail.

(8) Such risks to United States firms have been greatly magnified by reason of activities by foreign governments in selectively subsidizing, sponsoring cooperation of industry members, or otherwise coordinating industrial research and development programs to enhance the positions of foreign firms in the United States and global markets.

(9) The role of research and development, as well as the prohibitive expenses, resource

shortages, and increasing risks in its performance, prevail across the entire spectrum of United States industries.

(10) There are genuine procompetitive benefits of cooperative research and development programs in that new knowledge, information, base technologies and products are brought forward.

(11) The uncertainty of interpretation and enforcement of present antitrust laws discourages cooperative research and development, often where cooperative activity would foster innovation and enhance competition.

(12) Some of the most effective Federal actions to encourage long-term and necessary private investment in research and development are to remove uncertainties in regard to the interpretation and enforcement of the applicable antitrust laws and remove potential legal barriers to research and development.

(13) There is thus a need to modify the application of the antitrust laws in order to encourage commercial entities to carry out productive joint research and development projects.

(b) The purpose of this Act is to modify the operation of the antitrust laws and of similar State laws for certain joint research and development projects and

thereby encourage commercial entities to carry out, and to secure the benefits of, certain projects in order to increase industrial innovation, productivity, and the economic competitiveness of the United States.

APPLICATION OF ANTITRUST LAWS

SEC. 3. (a) No person shall be liable in any civil or criminal action under the antitrust laws, or under any State law similar to the antitrust laws for making a contract or for performing a contract to carry out a research and development project jointly with another person if

(1),

(2),

(3), [Standards to be Supplied]

(4), [May be More or Less in Number]

(5), and

(6)

(b) No person shall be liable in any civil or criminal action under the antitrust laws, or under any State law similar to the antitrust laws, for attempting to make a contract with another person for the performance of a research and development product if the joint conduct of such persons is limited to attempting to make such contract.

(c) In any action under the antitrust laws, or under any State law similar to the antitrust laws, arising out of the defendant's attempting to make, making, or performing a contract to carry out a research and development project jointly with another person, judgment shall be entered for the defendant

unless the plaintiff 1) establishes a cause of action against the defendant under any of the antitrust laws, or if appropriate under any State law similar to the antitrust laws, and 2) establishes that the conduct in question has failed to satisfy the applicable provisions of this section.

(d) Failure to satisfy the provisions of subsection (a) shall not be admissible as evidence in any administrative or judicial proceeding based on a claim arising under the antitrust laws or any State law similar to the antitrust laws.

DISCLOSURE TO ATTORNEY GENERAL

SEC. 4. (a) Except as provided in subsection (b), no person shall be liable in any civil or criminal action brought under the antitrust laws, or under any State law similar to the antitrust laws, against any person for making a contract or for performing a contract to carry out a research and development project jointly with another person if such conduct occurs after the disclosure of such conduct to the Attorney General pursuant to subsection (c).

(b) Nothing in this section shall affect the ability of the Attorney General or of any person to obtain injunctive relief in any action under the antitrust laws. However, any injunctive relief shall be prospective only and shall not have the effect of rescinding the protections of subsection (a), including protection against the imposition of damages, with respect to the period beginning with the making of disclosure pursuant to subsection (c) and ending with the granting of injunctive relief.

(c) Any person making, having made, or performing a contract to carry out a research and development project jointly with another person may disclose such conduct to the Attorney General. Such disclosure shall identify the parties

making, having made, or performing such contract, describe the nature, scope, and duration of each project, and provide any other information which the Attorney General may, by regulation, require. Only the persons and the conduct of those persons specified in such disclosure shall be entitled to the protections of subsection (a), but additional disclosure may be made as appropriate.

(d) Within 30 days of any disclosure made pursuant to this section, the Attorney General shall cause to be published in the Federal Register notice of such disclosure, describing in general terms the parties, the research and development project, and its objectives.

(e)(1) Except as provided in section 552(b) of title 5, United States Code, and except as provided in paragraph (2), all information and documentary materials submitted as part of the disclosure pursuant to this section shall be available to the public upon request within 30 days after its submission to the Attorney General.

(2) Any person making a disclosure pursuant to this section may request that information or documentary material submitted as part of such disclosure, which is not otherwise exempt from availability to the public under section 552 of title 5, United States Code, not be made available to the public. Any such request shall specify precisely what information or documentary material should not be made available to the public, state the minimum period of time during which it is considered necessary that such information or documentary material not be made available to the public, and justify such request both as to content and time. If the Attorney General determines that there is good cause to withhold such information or documentary material, it shall be

exempt from availability to the public under section 552(a) of title 5, United States Code.

RULE OF REASON STANDARD

SEC. 5. In any action under the antitrust laws, or under any State law similar to the antitrust laws, the conduct of any person relating to attempting to make, making, or performing a contract to carry out a research and development project jointly with another person shall not be deemed illegal per se.

DAMAGES

SEC. 6. No person shall be liable under the antitrust laws or under any State law similar to the antitrust laws for an amount in excess of the actual damages sustained by the claimant by reason of the violation of any such law, the cost of suit (including a reasonable attorney's fee), and any interest awarded (from the date of judgment) with respect to such damages if such liability is based on conduct relating to attempting to make, making, or performing a contract to carry out a research and development project jointly with another person.

ATTORNEY'S FEES

SEC. 7. In any action under the antitrust laws, or any State law similar to the antitrust laws, brought against a defendant who is not found liable with respect to a claim in such action based upon conduct of the defendant relating to attempting to make, making, or performing a contract to carry out a research and development project jointly with another person, the court shall award to the prevailing defendant the cost of suit, including a reasonable attorney's fee, attributable to defending against such claim.

INVESTIGATION BY ATTORNEY GENERAL

SEC. 8. (a) The Attorney General may investigate any person for attempting to make, for making, or for performing a contract to carry out a research and development project jointly with another person for the purpose of determining whether such conduct satisfies the provisions of section 3.

(b) The Attorney General may investigate persons who submit a disclosure of their activities under section 4, for the purpose of determining whether such disclosure omits or misrepresents any material fact.

(c) If in any investigation of a person attempting to make, making, or performing a contract to carry out a research and development project jointly with another person, the Attorney General determines that such conduct is both actionable under the antitrust laws and does not satisfy the applicable provisions of section 3, then the Attorney General shall give written notice of such determination to the parties to such contract if such parties have made disclosure under section 4. Such notice by the Attorney General shall include --

(1) A statement of the facts and reasons in support of such determination, and

(2) A statement specifying any actions that such parties may take to modify such conduct to satisfy the provisions of section 3 or to comply with the antitrust laws.

(d) No action may be brought by the Attorney General within 30 days of the receipt of any such notice required to be given under subsection (c).

(e) Information obtained by the Attorney General in the course of conducting any investigation under this section is exempt from disclosure under section 552 of title 5, United States Code.

(f) No determination made by the Attorney General under this section shall be admissible as evidence in any administrative or judicial proceeding based on a claim arising under the antitrust laws or any State law similar to the antitrust laws.

DEFINITIONS

SEC. 9. For purposes of this Act --

(a) The term "antitrust laws" shall have the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)), except that such term shall include section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that such section 5 relates to unfair methods of competition,

(b) The term "Attorney General" means the Attorney General of the United States,

(c) The term "contract" shall include any ancillary agreements or understandings, written or otherwise,

(d) The term "person" shall have the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)),

(e)(1) The term "research and development project" means a project involving basic and applied research, exploratory development, technology development, concept and demonstration development, or operational development; provided, that for purposes

of this Act, such a project may include the establishment of facilities for the conduct of research, the collecting and exchange of research information, the conduct of research on a protected and proprietary basis, the prosecution of applications for patents, the granting of licenses, the collection of royalties, and any other conduct reasonably necessary and appropriate to such project;

(2) As used in paragraph (1) --

(A) The term "basic research" means systematic and intensive study and experimentation directed toward greater knowledge or understanding of a specific subject, and toward the expansion of man's fundamental knowledge of nature (with or without immediate relevance to specific technology programs);

(B) The term "applied research" means systematic efforts directed specifically toward the application of new knowledge to meet a recognized need; these efforts could include studies and experimental models;

(C) The term "exploratory development" means the conduct of activities designed or intended to lead to a practical utilization of research results for the development of a particular application or product or to explore possible innovation in a particular area;

(D) The term "technology development" means the systematic application of knowledge to advance technology through the conduct of

activities designed to provide a transition from research and exploratory development to engineering systems development to solve a particularly defined technical problem in order to achieve proof of principle, to show the technical feasibility of a process innovation, or to construct a key component of the system involved;

(E) The term "concept and demonstration development" includes engineering development activities designed to achieve standards of performance, reliability, and process function up through the state of pilot-scale or demonstration units, to identify solutions to meet specific functional, and/or economic requirements; and

(F) The term "operational development" means design, construction and testing of prototypes, models, equipment, devices, materials and processes with the objective of providing sufficient data or information to reduce the technical risks associated with full scale construction or commercial production. "Operational development" does not include the specific manufacturing design of a product that is offered for sale or expected to be offered for sale.

(f) The term "State" shall have the meaning given it in section 4G(2) of the Clayton Act (15 U.S.C. 15g(2)).

EFFECTIVE DATE

SEC. 10. This Act shall take effect on the date of the enactment of this Act and shall apply to any joint research and development project in existence on or after the date of its enactment that satisfies its provisions.

SIA SEMICONDUCTOR INDUSTRY ASSOCIATION
4320 Stevens Creek Blvd. • Suite 275 • San Jose, CA 95129 • (408) 246-1181

SEP 2 1 1983

September 16, 1983

The Honorable Doug Walgren
Chairman, Subcommittee on Science,
Research & Technology
2441 Rayburn House Office Building
Washington, D.C. 20515

RE: R&D Joint Ventures

Dear Chairman Walgren:

As you will recall, on July 25, 1983, I submitted to you on behalf of the Semiconductor Industry Association legislative language incorporating the basic principles of Joint R&D Venture legislation to which I testified before your Subcommittee on July 12, 1983. Since on those dates the SIA had not yet taken a position regarding what standards would be appropriate to provide a "safe harbor" for joint R&D ventures, the draft I submitted was silent on the subject.

On September 8, 1983, the SIA Law Committee which I chair met and agreed to endorse the standards which are contained in the enclosed amendment to our original submission. The two submissions together now comprise a complete package. A copy of our original submission as modified by our present submission is also enclosed to facilitate understanding of our position. We earnestly hope that the Subcommittee will take our submissions into consideration at the scheduled mark-up of Joint R&D Venture legislation on October 4, 1983.

While we obviously support our own efforts in drafting "safe harbor" standards, we remain open to other possible approaches so long as they provide clear guidance to potential joint ventures and protect the public interest in competition. Paragraphs (7), (9), and (10) proved to be somewhat difficult propositions within our membership. While other combinations of standards might prove suitable in promoting research and development while protecting the public interest in competition, we were unable to construct any alternative that did not fail the necessary condition of clarity. However, we may possibly have overlooked some workable formulation that would make it unnecessary to

include paragraphs (7) or (10), which may prove objectionable to certain industry segments. In continuing to strive for an ideal set of standards, we would be pleased to discuss any approaches you might have in mind to accomplish our common objective.

You will note in reviewing our submitted "safe harbor" standards that they are fewer in number than those contained in H.R.1952 and H.R.3393. They are generally designed to ensure that joint R&D ventures pose no threat to antitrust principles. Other bills, such as H.R.1952 and H.R.3393 include additional provisions which are permissive in nature and which we find salutary.

However, these permissive provisions pose a basic dilemma. If they are not included, there is less guidance for joint R&D ventures and more uncertainty; this would not tend to encourage more joint R&D activity. If these provisions are included, they will not exhaust all legal activity; such a list of legal acts would be much too long (we hope) for inclusion in a statute. Yet if a partial list is included, there is good reason to anticipate that the courts will view activities not listed as not authorized under the time-honored rule of construction expressio unius est exclusio alterius.

In view of this dilemma, we request that these permissive provisions be incorporated into the Committee Report on the legislation. In our opinion, this would encourage joint R&D activity without requiring the compilation of an exhaustive list of permitted acts.

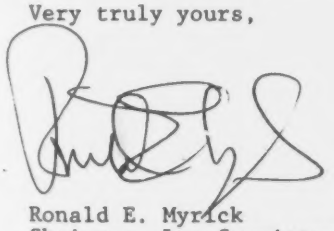
Some of these permissive provisions are as follows (with references to H.R. 1952, which appears to contain the longest list of permissive activities): the venture may take any legal form, section 4(d)(1); the parties to the contract may agree to non-disclosure of the results of their research for a reasonable time, section 4(c)(3)(B); no party need participate in all projects, but any party participating in such a reduced capacity may be required to pay a proportional share of the common costs, section 4(b)(3); the venture or the parties as a group may require each party to participate in at least one project, section 4(d)(5)(A); the venture or the parties as a group may require each party to participate for a minimum period of time, not to exceed 3 years, section 4(d)(5)(B); the venture or the parties as a group may impose reasonable catch-up charges for late-comers to an existing project, section 4(d)(5)(C); the venture or the parties as a group may exercise available legal remedies with respect to firms failing to comply with law, the "safe harbor" provisions or any contractual obligation by appropriate means, including expulsion from the venture, forfeiture of

payments to the venture, or the denial of any right, title, or interest in the venture's assets, section 4(d)(5)(D); the parties may be rewarded not equally but in proportion to the risks assumed and contributions made, section 4(e)(4); and the venture, if it is a separate corporation, may retain title to all inventions, patents, and know-how on behalf of the project participants, section 4(e)(2), and may collect royalties on behalf of the participants and may retain a portion of such royalties as may be agreed to by the parties, section 4(e)(7).

Undoubtedly, there are other permissive provisions which would be helpful to have included in the Committee Report. But the above provisions are illustrative of the kind of provisions we have in mind.

If you have any questions in regard to the "safe harbor" standards which are enclosed, report language which we have suggested, or any other aspect of the legislation, I would be pleased to discuss them with you. I can be contacted at (214) 466-6281.

Very truly yours,



Ronald E. Myrick
Chairman, Law Committee

Enclosure

cc: The Honorable Judd Gregg

AMENDMENT TO SIA BILL TO PROVIDE "SAFE HARBOR" STANDARDS

In lieu of subsection (a) and (b) of Section 3, insert the following:

SEC. 3. (a) No person shall be liable in any civil or criminal action under the antitrust laws, or under any State law similar to the antitrust laws, for making a contract or for performing a contract to carry out a research and development project jointly with another person if

(1) Such contract provides that the parties to such contract shall carry out jointly one or more research and development projects;

(2) The conduct of the parties with respect to such contract is limited to conduct reasonably related to making or performing a contract to carry out one or more joint research and development projects;

(3) Such contract, to the extent practicable, individually identifies and defines the research and development projects to be carried out and describes the principal obligations imposed on each party to the contract with respect to each project;

(4) Such contract does not impose on any such party --

(A) Any restriction or requirement with respect to the production or marketing of any

product or service unrelated to or resulting from any project,

(B) Any restriction with respect to any research and development project, other than a restriction respecting the research and development project to be carried out under such contract, which may be carried out by such party,

(C) Any obligation to make available to any other person the results of any research and development project, other than a research and development project carried out under or relating to such contract, carried out by such party,

(D) Any restriction on the exercise of any right such party may have to exploit the inventions or use any information resulting from a research and development project carried out under such contract, except for restrictions either to protect the assets of the project or to provide for joint licensing and collection of royalties;

(5) Such contract provides that at the time an invention or technology is discovered or developed it shall be reported to each party to such contract;

(6) Such contract provides that all licenses shall be granted to participants in a project on irrevocable, nonexclusive and nondiscriminatory terms;

(7) [PREFFERED ALTERNATIVE TO (7A)] Such contract provides that not later than three years after licensable technology is discovered or developed with respect to a research and development project, licenses (A) shall be made available to any parties to the contract who are not participants in such project on fair and reasonable terms in view of the risks assumed and resources expended by the participants in such project and either

(i) for consideration of royalties which are, to the extent reasonably possible, based on volume or usage, or

(ii) on terms nondiscriminatory with respect to such parties to the contract who are not participants in such project, and

(B) may be made available to persons who are not parties to the contract on fair and reasonable terms in view of the risks assumed and resources expended by the participants in such project either

(i) for consideration of royalties which are, to the extent reasonably possible, based on volume or usage, or

(ii) on terms nondiscriminatory with respect to persons who are not parties to the contract;

(7A) [ACCEPTABLE ALTERNATIVE TO (7)] Such contract provides that not later than three years (or such longer period of time established by regulations promulgated by the Attorney General on an industry-by-industry basis) after such parties have begun to enjoy commercial use of such licenses, licenses shall be made available to other persons on reasonable and fair terms in view of the risks assumed and resources expended by the parties and either (A) for consideration of royalties which are, to the extent reasonably possible, based on volume or usage, or (B) on terms nondiscriminatory within the group of persons not participating in the project;

(8) The conduct of the parties to the contract is not inconsistent with the provisions of the contract which are described in this subsection;

(9) The combination of the participants in any project does not preclude the practical opportunity for worldwide competition in research and development by three or more persons or combinations of persons (actual or potential) of substantially

equal capability for achieving similar goals in research and development; and

(10) No party to the contract with annual revenues in excess $1,000,000,000 on average for the five years previous to becoming a party to the contract contributes more than 25 percent of its annual expenditures related to research and development for the purpose of carrying out the contract.

(b) The provisions of paragraphs (9) and (10) of subsection (a) shall not be applicable to any person making a contract or performing a contract to carry out a research and development project jointly with another person

(1) If such projects are not intended to develop a product or service to be marketed, or

(2) During any period of time for which the President has certified that it is in the public interest that such projects be engaged in by such persons either to improve the national economy or to assure the national security.

(c) No person shall be liable in any civil or criminal action under the antitrust laws, or under any State law similar to the antitrust laws, for conduct relating to attempting to make a contract with another person for the performance of a research and development project.

Redesignate subsections (c) and (d) as subsections (d) and (e) respectively.

A BILL

To modify the operation of Federal and State antitrust laws for conducting of certain research and development activities jointly, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Research and Development Joint Venture Act of 1983".

SEC. 2. (a) The Congress finds the following:

(1) Research and development are major factors in the growth and productivity improvement of United States industry and of the national economy.

(2) Although innovations in some industries have resulted in impressive increases in productivity, the overall rate of growth in industrial productivity in the United States is decreasing.

(3) Growth in industrial productivity requires the strong support of research and development and the introduction of advanced concepts, processes, and industries.

(4) In order to maintain the international competitiveness of industries

in the United States, it is necessary to facilitate an increase in private research and development.

(5) Many firms are unable to undertake the levels of research and development necessary for the United States to remain competitive in global markets because of the capital intensive nature of research and development programs and the chronic shortage of trained scientific and engineering personnel.

(6) The expense and personnel requirements of carrying on a sufficiently broad spectrum of research and development programs is prohibitive for many businesses.

(7) A firm's or an industry's ability to commit capital to research and development ventures of potential national importance is often dependent upon such firm's or industries' being able to share the risks which projects often entail.

(8) Such risks to United States firms have been greatly magnified by reason of activities by foreign governments in selectively subsidizing, sponsoring cooperation of industry members, or otherwise coordinating industrial research and development programs

to enhance the positions of foreign firms in the United States and global markets.

(9) The role of research and development, as well as the prohibitive expenses, resource shortages, and increasing risks in its performance, prevail across the entire spectrum of United States industries.

(10) There are genuine procompetitive benefits of cooperative research and development programs in that new knowledge, information, base technologies and products are brought forward.

(11) The uncertainty of interpretation and enforcement of present antitrust laws discourages cooperative research and development, often where cooperative activity would foster innovation and enhance competition.

(12) Some of the most effective Federal actions to encourage long-term and necessary private investment in research and development are to remove uncertainties in regard to the interpretation and enforcement of the applicable antitrust laws and remove potential legal barriers to research and development.

(13) There is thus a need to modify the application of the antitrust laws in order to

encourage commercial entities to carry out productive joint research and development projects.

(b) The purpose of this Act is to modify the operation of the antitrust laws and of similar State laws for certain joint research and development projects and thereby encourage commercial entities to carry out, and to secure the benefits of, certain projects in order to increase industrial innovation, productivity, and the economic competitiveness of the United States.

SEC. 3. (a) No person shall be liable in any civil or criminal action under the antitrust laws, or under any State law similar to the antitrust laws, for making a contract or for performing a contract to carry out a research and development project jointly with another person if

(1) Such contract provides that the parties to such contract shall carry out jointly one or more research and development projects;

(2) The conduct of the parties with respect to such contract is limited to conduct reasonably related to making or performing a contract to carry out one or more joint research and development projects;

(3) Such contract, to the extent practicable, individually identifies and defines the research and development

projects to be carried out and describes the principal obligations imposed on each party to the contract with respect to each project;

(4) Such contract does not impose on any such party --

(A) Any restriction or requirement with respect to the production or marketing of any product or service unrelated to or resulting from any project,

(B) Any restriction with respect to any research and development project, other than a restriction respecting the research and development project to be carried out under such contract, which may be carried out by such party,

(C) Any obligation to make available to any other person the results of any research and development project, other than a research and development project carried out under or relating to such contract, carried out by such party,

(D) Any restriction on the exercise of any right such party may have to exploit the inventions or use any information resulting from a research and development project carried out under such contract, except for restrictions either to protect the assets of the project or to provide for joint licensing and collection of royalties;

(5) Such contract provides that at the time an invention or technology is discovered or developed it shall be reported to each party to such contract;

(6) Such contract provides that all licenses shall be granted to participants in a project on irrevocable, nonexclusive and nondiscriminatory terms;

(7) [PREFFERED ALTERNATIVE TO (7A)] Such contract provides that not later than three years after licensable technology is discovered or developed with respect to a research and development project, licenses (A) shall be made available to any parties to the contract who are not participants in such project on fair and reasonable terms in view of the risks

assumed and resources expended by the participants in such project and either

(i) for consideration of royalties which are, to the extent reasonably possible, based on volume or usage, or

(ii) on terms nondiscriminatory with respect to such parties to the contract who are not participants in such project, and

(B) may be made available to persons who are not parties to the contract on fair and reasonable terms in view of the risks assumed and resources expended by the participants in such project either

(i) for consideration of royalties which are, to the extent reasonably possible, based on volume or usage, or

(ii) on terms nondiscriminatory with respect to persons who are not parties to the contract;

(7A) [ACCEPTABLE ALTERNATIVE TO (7)] Such contract provides that not later than three years (or such longer period of time established by regulations promulgated by the Attorney General on an industry-by-industry basis) after such parties have begun to enjoy commercial use of such licenses, licenses shall

be made available to other persons on reasonable and fair terms in view of the risks assumed and resources expended by the parties and either (A) for consideration of royalties which are, to the extent reasonably possible, based on volume or usage, or (B) on terms nondiscriminatory within the group of persons not participating in the project;

(8) The conduct of the parties to the contract is not inconsistent with the provisions of the contract which are described in this subsection;

(9) The combination of the participants in any project does not preclude the practical opportunity for worldwide competition in research and development by three or more persons or combinations of persons (actual or potential) of substantially equal capability for achieving similar goals in research and development; and

(10) No party to the contract with annual revenues in excess $1,000,000,000 on average for the five years previous to becoming a party to the contract contributes more than 25 percent of its annual expenditures for research and development for the purpose of carrying out the contract.

(b) The provisions of paragraphs (9) and (10) of subsection (a) shall not be applicable to any person making a contract or performing a contract to carry out a research and development project jointly with another person

(1) If such projects are not intended to develop a product or service to be marketed, or

(2) During any period of time for which the President has certified that it is in the public interest that such projects be engaged in by such persons either to improve the national economy or to assure the national security.

(c) No person shall be liable in any civil or criminal action under the antitrust laws, or under any State law similar to the antitrust laws, for conduct relating to attempting to make a contract with another person for the performance of a research and development project.

(d) In any action under the antitrust laws, or under any State law similar to the antitrust laws, arising out of the defendant's attempting to make, making, or performing a contract to carry out a research and development project jointly with another person, judgment shall be entered for the defendant unless the plaintiff 1) establishes a cause of action against the defendant under any of the antitrust laws, or if appropriate under any State law similar to the antitrust laws, and 2) establishes that the conduct in question has failed to satisfy the applicable provisions of this section.

(e) Failure to satisfy the provisions of subsection (a) shall not be admissible as evidence in any administrative or judicial proceeding based on a claim arising under the antitrust laws or any State law similar to the antitrust laws.

DISCLOSURE TO ATTORNEY GENERAL

SEC. 4. (a) Except as provided in subsection (b), no person shall be liable in any civil or criminal action brought under the antitrust laws, or under any State law similar to the antitrust laws, against any person for making a contract or for performing a contract to carry out a research and development project jointly with another person if such conduct occurs after the disclosure of such conduct to the Attorney General pursuant to subsection (c).

(b) Nothing in this section shall affect the ability of the Attorney General or of any person to obtain injunctive relief in any action under the antitrust laws. However, any injunctive relief shall be prospective only and shall not have the effect of rescinding the protections of subsection (a), including protection against the imposition of damages, with respect to the period beginning with the making of disclosure pursuant to subsection (c) and ending with the granting of injunctive relief.

(c) Any person making, having made, or performing a contract to carry out a research and development project jointly with another person may disclose such conduct to the Attorney General. Such disclosure shall identify the parties

making, having made, or performing such contract, describe the nature, scope, and duration of each project, and provide any other information which the Attorney General may, by regulation, require. Only the persons and the conduct of those persons specified in such disclosure shall be entitled to the protections of subsection (a), but additional disclosure may be appropriate.

(d) Within 30 days of any disclosure made pursuant to this section, the Attorney General shall cause to be published in the Federal Register notice of such disclosure, describing in general terms the parties, the research and development project, and its objectives.

(e)(1) Except as provided in section 552(b) of title 5, United States Code, and except as provided in paragraph (2), all information and documentary materials submitted as part of the disclosure pursuant to this section shall be available to the public upon request within 30 days after its submission to the Attorney General.

(2) Any person making a disclosure pursuant to this section may request that information or documentary material submitted as part of such disclosure, which is not otherwise exempt from availability to the public under section 552 of title 5, United States Code, not be made available to the public. Any such request shall specify precisely what information or documentary material should not be made available to the public, state the minimum period of time during which it is considered necessary that such information or documentary material not be made available to the public, and justify such

request both as to content and time. If the Attorney General determines that there is good cause to withhold such information or documentary material, it shall be exempt from availability to the public under section 552(a) of title 5, United States Code.

RULE OF REASON STANDARD

SEC. 5. In any action under the antitrust laws, or under any State law similar to the antitrust laws, the conduct of any person relating to attempting to make, making, or performing a contract to carry out a research and development project jointly with another person shall not be deemed illegal per se.

DAMAGES

SEC. 6. No person shall be liable under the antitrust laws or under any State law similar to the antitrust laws for an amount in excess of the actual damages sustained by the claimant by reason of the violation of any such law, the cost of suit (including a reasonable attorney's fee), and any interest awarded (from the date of judgment) with respect to such damages if such liability is based on conduct relating to attempting to make, making, or performing a contract to carry out a research and development project jointly with another person.

ATTORNEY'S FEES

SEC. 7. In any action under the antitrust laws, or any State law similar to the antitrust laws, brought against a defendant who is not found liable with respect to a claim in such action based upon conduct of the defendant relating to attempting to make, making, or performing a contract to carry out a research and development project jointly with another person, the court

shall award to the prevailing defendant the cost of suit, including a reasonable attorney's fee, attributable to defending against such claim.

INVESTIGATION BY ATTORNEY GENERAL

SEC. 8. (a) The Attorney General may investigate any person for attempting to make, for making, or for performing a contract to carry out a research and development project jointly with another person for the purpose of determining whether such conduct satisfies the provisions of section 3.

(b) The Attorney General may investigate persons who submit a disclosure of their activities under section 4, for the purpose of determining whether such disclosure omits or misrepresents any material fact.

(c) If in any investigation of a person attempting to make, making, or performing a contract to carry out a research and development project jointly with another person, the Attorney General determines that such conduct is both actionable under the antitrust laws and does not satisfy the applicable provisions of section 3, then the Attorney General shall give written notice of such determination to the parties to such contract if such parties have made disclosure under section 4. Such notice by the Attorney General shall include --

(1) A statement of the facts and reasons in support of such determination, and

(2) A statement specifying any actions that such parties may take to modify such

conduct to satisfy the provisions of section 3 or to comply with the antitrust laws.

(d) No action may be brought by the Attorney General within 30 days of the receipt of any such notice required to be given under subsection (c).

(e) Information obtained by the Attorney General in the course of conducting any investigation under this section is exempt from disclosure under section 552 of title 5, United States Code.

(f) No determination made by the Attorney General under this section shall be admissible as evidence in any administrative or judicial proceeding based on a claim arising under the antitrust laws or any State law similar to the antitrust laws.

DEFINITIONS

SEC. 9. For purposes of this Act --

(a) The term "antitrust laws" shall have the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)), except that such term shall include section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that such section 5 relates to unfair methods of competition,

(b) The term "Attorney General" means the Attorney General of the United States,

(c) The term "contract" means the agreement written or otherwise by which two or more persons engage in research and development activity jointly, including any ancillary agreements or understandings,

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(d) The term "person" shall have the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)),

(e)(1) The term "research and development project" means a project involving basic and applied research, exploratory development, technology development, concept and demonstration development, or operational development; provided, that for purposes of this Act, such a project may include the establishment of facilities for the conduct of research, the collecting and exchange of research information, the conduct of research on a protected and proprietary basis, the prosecution of applications for patents, the granting of licenses, the collection of royalties, and any other conduct reasonably necessary and appropriate to such project;

(2) As used in paragraph (1) --

(A) The term "basic research" means systematic and intensive study and experimentation directed toward greater knowledge or understanding of a specific subject, and toward the expansion of man's fundamental knowledge of nature (with or without immediate relevance to specific technology programs);

(B) The term "applied research" means systematic efforts directed specifically toward the application of new knowledge to meet a recognized

need; these efforts could include studies and experimental models;

(C) The term "exploratory development" means the conduct of activities designed or intended to lead to a practical utilization of research results for the development of a particular application or product or to explore possible innovation in a particular area;

(D) The term "technology development" means the systematic application of knowledge to advance technology through the conduct of activities designed to provide a transition from research and exploratory development to engineering systems development to solve a particularly defined technical problem in order to achieve proof of principle, to show the technical feasibility of a process innovation, or to construct a key component of the system involved;

(E) The term "concept and demonstration development" includes engineering development activities

designed to achieve standards of performance, reliability, and process function up through the state of pilot-scale or demonstration units, to identify solutions to meet specific functional, and/or economic requirements; and

(F) The term "operational development" means design, construction and testing of prototypes, models, equipment, devices, materials and processes with the objective of providing sufficient data or information to reduce the technical risks associated with full scale construction or commercial production. "Operational development" does not include the specific manufacturing design of a product that is offered for sale or expected to be offered for sale.

(f) The term "State" shall have the meaning given it in section 4G(2) of the Clayton Act (15 U.S.C. 15g(2)).

EFFECTIVE DATE

SEC. 10. This Act shall take effect on the date of the enactment of this Act and shall apply to any joint research and development project in existence on or after the date of its enactment that satisfies its provisions.

APPENDIX III

IEEE UNITED STATES ACTIVITIES BOARD
THE INSTITUTE OF ELECTRICAL AND ELECTRONICS ENGINEERS, INC.

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Vice President
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TESTIMONY OF THE IEEE U.S. ACTIVITIES BOARD TASK FORCE ON PRODUCTIVITY AND INNOVATION ENDORSING LEGISLATION TO CLARIFY STATUTES ON ANTI-TRUST IMMUNITY FOR JOINT VENTURES IN RESEARCH AND DEVELOPMENT

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The following is testimony of the Institute of Electrical and Electronics Engineers (IEEE) U.S. Activities Board (USAB) Task Force on Productivity and Innovation prepared for submission to the Committee on Science and Technology (Subcommittee on Science, Research, and Technology) United States House of Representatives, on Friday, October 14, 1983.

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The IEEE is the world's largest technical professional society, with over 230,000 members worldwide, 190,000 of whom live and work in the United States. In 1978, it created a new unit to address issues relating to productivity and innovation. That body is made up of engineers who know R&D as engineer/innovators, as managers and as exporters.

The IEEE, as a general rule, confines its public policy statements to technical issues. However, because of this country's relative economic decline, IEEE has concluded that an examination of the rules governing cooperative research is in order. Because of the country's economic downturn, the IEEE has devoted a large share of its resources in recent years to a study of advanced technology and its contribution to economic well-being. IEEE has established panels on Technology Transfer, on R&D, on Technology Policy, on Energy, on Telecommunications and Information Policy, and on Productivity and Innovation. The thrust of all their recommendations is that government should foster economic growth and international competitiveness, as well as national security, by steadfast support of basic and applied research. The central thrust of U.S. government policy should encourage technological growth at a rate that ensures our technological eminence and international competitive stature.

One challenge U.S. industry faces in the 80's is a special kind of international competition. In Japan and some of the industrialized countries of western Europe the aerospace and electronics industries have embarked on a series of ventures, with financial support from government and other types of government assistance, aimed at seizing the lead in international industrial competition. In Japan the combined forces of the Ministry of International Trade and Industry and the major electronics firms have announced their intent of taking the lead in several sectors of the electronic industry.

The competitive challenge affects all the industries from which IEEE draws its members: electric power, communications, computers, aerospace, and high technology R&D.

The U.S. can take up this challenge on one front by a vast increase in technological cooperation in joint R&D, which many of the pending anti-trust bills can help stimulate.

We believe American ingenuity is as vital today as it ever was. The threats to our predominance are from the fast growth of foreign competition from industrialized nations and countries emerging from a "third world" status. Our competitors do not labor under anti-trust laws as severe as ours, which are a peculiarly American institution.

President Reagan made an excellent case for amending the law in an address to the White House Conference on Productivity on September 2 when he said the following:

"This bill (the Administration's draft) would encourage companies to work together on complex and new products, more exports and higher employment. Current antitrust laws often discourage joint research and development efforts. Well, we can't afford to sleep-walk into the 21st century, permitting our competitors to seize the advantage and overtake us. I am confident the Congress will work with us to pass this legislation."

Benefits of Increasing R&D via joint efforts

There are many practical justifications for promoting joint R&D efforts. First of all, many companies simply are not able to perform desired levels of R&D because of a lack of financial resources--R&D is very capital intensive. The cost of innovation in computer technology, for example, is growing exponentially. Secondly, many companies lack the specialized human resources: there is an acute shortage of adequately trained scientific and engineering manpower with experience in the needs of the market and the manufacturing floor.

Clarifying legislation would eliminate current legal uncertainty surrounding joint R&D ventures, stimulating increased or

more effective R&D by the private sector. Over time, this would create a framework for longterm basic industrial research activity. As you well know, too much of the industrial research performed focuses only on shorter-term applied research driven by stock market's and equity financed industry's need for immediate return on investment. By pooling resources, companies could avoid duplication of R&D in the more basic areas and with carefully developed strategies, they could afford longer-term research, the fruits of which could improve our industrial competitiveness worldwide and in turn create both jobs in service and manufacturing industries.

Other Benefits: Boost for long-term research; incentives for small business

It is generally acknowledged that a good part of today's industrial R&D is dedicated to short-term applied research. With the freedom to pool resources, companies can dedicate part of this resource to more basic longer-term research. IEEE believes our industries, freed from the threat of spurious prosecution for alleged anti-trust violations, can embark on productive joint ventures in R&D. This Administration has demonstrated a genuine awareness of the process of innovation, through the long chain from invention to product, and is supportive of cooperative research projects. In fact, two ventures have come into being during the past year, MCC and SRC.* However, because Attorneys General come and go, it is important that the laws be amended to make clear that cooperative research ventures will remain proper and lawful and that ventures that qualify for Justice Department certification are free from civil or criminal prosecution. This legal stability is needed for the long-term commitment of resources by business. In addition, a combined effort at R&D would permit the entry and assistance of many small firms and industries that are held back by lack of the capital required to enter a new field of research. Small business can bring innovations to the market more rapidly. Cooperation would also cut down on duplicative research efforts that waste rare manpower and facilities resources and reduce the misuse of talented researchers.

What Kind of Legislation IEEE Supports

We recommend that Congress act promptly to amend the nation's anti-trust laws to encourage joint ventures for R&D by empowering the Department of Justice to certify the venture. Legislation stating the rules under which the Justice Department should operate is imperative. The knowledge that joint ventures, carried on in accordance with the terms of certification, can be pursued without the threat of prosecution by the government or the uncertainties of civil suits for damages will serve as a great impetus to R&D.

* Semi-Conductor Research Group (SRC)
Microelectronics Computer and Technology Corp. (MCC)

We regard government "certification" as an essential part of reform. Certification will clear up uncertainties, will give the assurance needed to the would-be partners in a joint-venture, and will serve as a deterrent to frivolous lawsuits.

We are aware of the Justice Department's aversion to the job of "certifying" a venture. Assistant Attorney General William F. Baxter has said this would impose an unsuitable regulatory burden on an agency whose business is law enforcement. However, under current procedures the Department does examine proposed joint ventures, process business-preclearance, and does exercise a continuing surveillance over their affairs. We believe it is but one additional step for Justice to "certify" a joint venture, giving to the new organization the confidence it requires to perform without fear and anxiety.

We recommend that the Department of Justice institute procedures that will ensure that the certification process be completed within a reasonable time, but certainly within one year from date of filing the application.

Definition of R&D

We believe a sound and workable definition of R&D encompasses the following (as set out in H.R. 108):

> (4) the term "research and development program" means a program for--
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> (A) theoretical analysis, exploration, or experimentation, or
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> (B) the extension of investigative findings and theories of a scientific or technical nature into practical application for experimental and demonstration purposes, including the experimental production and testing of models, devices, equipment, materials, and processes,
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> except that the conduct of such program may include the establishment of facilities for the conduct of research, the collecting and exchange of research information, the conduct of research on a protected and proprietary basis, the prosecution of applications for patents and the granting of licenses, and the establishment of corporations to exploit patents, and

The definitions contained in other bills state that acceptable R&D conduct includes work "up to the stage of industrial application, including the production, testing and licensing of models, devices, equipment, materials, and processes." We believe this restrictive phrase should be deleted since the process varies considerably from industry to industry.

Simple Bill is Best

Because of the urgency of encouraging joint R&D, we do not believe it is useful to examine the whole sweep of the anti-trust code at this time as the Administration has proposed. It is important for Congress to focus on joint R&D by eliminating the confusion that now exists and letting American industry know what forms of cooperation are permitted.

To this end, it is necessary to clarify the law with respect to penalties that apply in lawsuits launched by an aggrieved industry-plaintiff. Under present law, a victorious plaintiff stands to gain treble damages. We support continuation of the treble damage penalty for conduct, such as price-fixing, that is impermissible under anti-trust and other statutes. However, so attractive is this treble damage prospect that shallow claims are often made. Industrialists and some legal scholars state that the principal deterrent to joint ventures in R&D is the threat of frivolous actions and treble damages, plus the cost of protracted litigation and ensuing legal fees that the loser must pay. The time and creative talent lost through frivolous lawsuits for purposes of bounty are also a heavy price to pay.

It is our position, therefore, that joint research projects that are carried out in accordance with the terms of the certificate granted by the Justice Department should not be subject either to government action or to treble-damage private suits. In the event of private suits for conduct held to be outside the terms of the certificate, the damages should be restricted to actual damages, plus reasonable attorneys fees.

Again, we would emphasize that although the legislation to encourage joint R&D ventures is one of many aspects of the anti-trust laws, it is too important to become captive to the larger debate that will follow the Administration's proposals for sweeping anti-trust reforms. We urge that this Committee focus its efforts on the joint R&D issues and address the other proposals in separate legislation.

U.S. Anti-trust Laws are Unique in Their Application

The application of U.S. anti-trust laws to cooperative research is unique in the world context. Other industrialized nations both allow and encourage cooperative R&D efforts. In Japan, the government itself fosters cooperation among industrial concerns in targeted sectors, provides the financial incentives, and sets the goals. We are not suggesting that this be the model for the United States. What is important is to modify those laws and policies that act as threats and barriers to American industry's ability to be more productive and innovative by utilizing joint R&D.

There is no question that the existing uncertainty as to the scope of the anti-trust laws as they relate to joint ventures for R&D constitutes one such barrier. Legislation to remove that barrier would not change the major thrust of existing anti-trust laws. A re-statement of the rules on joint ventures for R&D and positive action by the government (through the Department of Justice) would foster an environment conducive to achieving an important national policy goal -- increased innovation through joint research.

Patent Right, Title to Inventions

Under some of the bills, all of the parties in the joint venture would retain title to all inventions, patents or other useful information and know-how developed in the course of the ventures. All participant firms would also be entitled to obtain irrevocable, nonexclusive and equivalent licenses to all patents obtained by the parties. After three years, licenses could then be made available to any other U.S. firm on equitable terms reflecting prior costs and risks taken by the original participants. While some of the provisions relating to patents may not be acceptable to all parties, particularly those provisions having the effect of compulsory licensing, we feel confident that mutually satisfactory arrangements can be worked out.

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